PRODUCT LIABILITY REFORM

HEARINGS

BEFORE THE

SUBCOMMITTEE FOR CONSUMERS

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

S. 2631

TO REGULATE INTERSTATE COMMERCE BY PROVIDING FOR A UNIFORM PRODUCT LIABILITY LAW, AND FOR OTHER PURPOSES

MARCH 9, 12, JUNE 30, AND JULY 1, 1982

Serial No. 97-109

Printed for the use of the
Committee on Commerce, Science, and Transportation

U.S. GOVERNMENT PRINTING OFFICE
92-808 O WASHINGTON : 1982

S261-61

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PRODUCT LIABILITY REFORM

TUESDAY, MARCH 9, 1982

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE FOR CONSUMERS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9.35 a.m., in room 235, Russell Senate Office Building, Hon. Bob Kasten (chairman of the subcommittee) presiding.

Staff members assigned to these hearings: Marilyn S. Richmond, and Richard L. Perlmutter, staff counsel, and Michael J. Mullen, minority staff counsel.

OPENING STATEMENT BY SENATOR KASTEN

Senator KASTEN. Good morning.

I am pleased to open this first of 2 days of hearings on the need to create a uniform product liability law in the United States.

As you may be aware, the subcommittee's first staff draft of legislation was circulated for public comment on October 15, 1981. The response, quite frankly, has been overwhelming. We received over 2,000 pages of comments from over 100 interested groups. The comments, reflecting a wide range of views, were most helpful in the preparation of staff draft No. 2.

I believe the commentary reflects a growing consensus, and I think it is a real consensus, that Federal legislation is needed to bring uniformity and certainty to the law and to stabilize what has become a very serious burden on interstate commerce.

The problems associated with the product liability tort system were identified 5 years ago by the Federal Interagency Task Force on Product Liability. That task force concluded after 18 months of study that uncertainty in the law caused serious problems for all parties involved in product liability claims.

This effort seeks to remedy those problems by establishing uniform standards to be applied in all product liability actions. The benefits of uniformity have been variously stated and no doubt will be discussed here today.

Suffice it to say that the goals of any Federal product liability tort reform bill must be threefold. First, the bill should reduce the cost of bringing and pursuing a valid claim. It is simply unacceptable that 7 cents in legal fees must be expended in order for a claimant to recover 6 cents. Second, the bill should encourage the manufacture and sale of safe products. This can be done principally by placing the responsibility for harm at the door of the party which caused the harm. Third, the bill should provide a clear and reasonable guideline so that the parties can identify their rights and liabilities in the particular case.

During the course of our hearings we will be hearing from representatives of the academic community, individual businesses, and a broad range of consumer and product seller organizations.

I recognize that there are many controversial issues related to product liability reform, and I look forward to exploring these issues.

Senator Cannon had hoped to be with us this morning. He has asked that I enter his statement, an opening statement of his in the record, and without objection I will do so at this time.

[The statement follows:]

OPENING STATEMENT BY HON. HOWARD W. CANNON, U.S. SENATOR FROM NEVADA

Mr. Chairman, it is both appropriate and timely for the Subcommittee to conduct exploratory hearings on the need for a Federal Product Liability Tort Act. I want to state clearly at the outset of these hearings that I have an open mind on this issue, and do not intend to prejudge the arguments of either side. On the other hand though, I think the burden is clearly on those seeking change to demonstrate that a Federal law is needed and justified.

I look forward to the testimony we will receive this morning and in the days ahead. I am sure that the distinguished list of witnesses we are scheduled to hear from will clarify many of the current issues of product liability law.

Senator **KASTEN**. For the benefit of the witnesses here today, I will review quickly the hearing procedures that will be in effect.

Most of the witnesses here today will be arranged in panels. Each member of the panel will have an opportunity to make a 5-minute oral presentation. The hearing clerk will indicate when the time has expired. Following the presentations of all panel members we will begin rounds of questions from members of the subcommittee. Each Senator will have roughly 5 minutes in each round of questioning.

We are pleased to welcome here today Senator John Glenn and Congressman Norm Shumway. We look forward to hearing your statements.

And, Senator Glenn, I am particularly pleased that because of your interest in this subject in prior years that you have taken the time to join us at our hearing this morning.

Senator John Glenn from Ohio.

STATEMENT OF HON. JOHN H. GLENN, U.S. SENATOR FROM OHIO

Senator **GLENN**. Thank you very much, Mr. Chairman. We did do some work in this area about 3 years ago, and I would say for lack of being able to come out with some solution to the problem it really has laid there dormant in the intervening time period. I very much welcome and appreciate your effort to get this whole subject going again. And I appreciate this opportunity to voice my support for Federal products liability reform.

We clearly have a problem in this regard. All across the Nation insurance rates and transaction costs continue their steady climb. The mere threat of litigation has generated within the business community a reluctance to even develop new products. And a confusing, widely divergent and frequently changing body of State laws leaves consumers and manufacturers alike with no clear understanding of their rights and responsibilities.

Who benefits from this state of affairs? Certainly not manufacturers or product sellers, who must do business while the rules of the road in products liability change all around them, often with bewildering speed. And certainly not consumers, who ultimately pay all of the insurance costs and legal fees, who are being denied access to new and better products, and whose rights to recover for an injury depend almost entirely on the chance circumstances of just where they live or happen to be at the time of injury.

Mr. Chairman, the products liability problem is clearly national in scope, and it requires a national solution; in this case, a uniform Federal law.

I am not so naive as to believe that writing such a law will be easy. In fact, from what we found out 3 years ago, it will be extremely difficult. Interest in this subject runs very high, and previous congressional hearings have revealed that many of these involved are only willing to sacrifice the rights of others in order to arrive at reform.

To some this means simply closing the courthouse door on injured parties, and to others it means laying all financial responsibility for injuries upon manufacturers and sellers, regardless of the user's own negligence or misuse of the product involved.

I remember testimony from back when we had hearings on this before, Mr. Chairman. One of the companies from my home State of Ohio, as I recall, had a product that had been out 20 some years. It had been used without any injury to anyone. It then was modified by having holes drilled through a casting to have a sign put on. It was then used for another 5 or 6 years after that. Finally it failed at the point where the alteration had been made. The company was held liable, and rather than push it on to appeal after appeal through the courts, they finally gave up and settled.

Now, that is ridiculous, of course. I believe we can do better than that.

Mr. Chairman, I sincerely hope that these hearings will provide us with a foundation for drafting truly equitable products liability legislation, and I offer the following principles for the committee's consideration.

Products liability law should be built upon incentives to provide for safety, not just arbitrary limitations on liability.

Second, people should be held responsible for their own negligence, for misuse or alteration of products beyond the boundaries of commonsense.

Third, just as products liability law is an evolving concept, so is society's concept of safety. It is not fair to judge yesterday's products by today's safety standards.

And finally, let us all recognize that Government's role in the products liability field should be strictly limited to establishing fair rules and providing neutral forums for the settlement of disputes.

Mr. Chairman, I submit these rules for the committee's consideration. I am not necessarily wedded to any particular means of implementing them. Indeed, I am open to reasonable compromise in every area, and I hope those who follow me at these hearings will be taking the same approach.

I wish you the very best in these hearings, Mr. Chairman, and look forward to working with you if we get legislation to the floor.

Senator **Kasten**. Thank you very much. I know that your State of Ohio, like my State of Wisconsin, has a large number of very small manufacturing companies. One of the major efforts we are making in the process of developing this legislation, as reflected in the second draft of this legislation, is to look at the needs and concerns of small business. It is the small people who are about to take a risk that are being fenced out of business. We are trying to represent the needs of the kind of manufacturers that I know you represent and I know that I do.

Senator **Glenn**. I agree. There are many small manufacturers in that category, big ones also. They are being hit with multimillion dollar lawsuits for a machine they designed and made that has operated quite satisfactorily for many years perhaps. And so it hits at all levels of business.

Senator **Kasten**. Thank you very much, Senator Glenn, for joining us this morning.

Our next witness is Congressman Norm Shumway.

Congressman Shumway.

STATEMENT OF HON. NORMAN D. SHUMWAY, U.S. REPRESENTATIVE FROM CALIFORNIA

Mr. **Shumway**. Thank you, Mr. Chairman. I am delighted to be here this morning, and I would like to commend the chairman for pursuing this inquiry into the product liability problem. At the same time I would like to commend the staff work which has been done in this committee for the first working draft and the second version. Those drafts have been very helpful to me and others who are interested in this particular question.

As you know, in the House I am the sponsor of H.R. 5214, a bill which also provides for a federally preemptive product liability tort law. That bill was introduced on December 14, 1981. But given the purpose of today's hearing, which is to spell out the parameters of the product liability problem and to investigate the need for a Federal solution, I do not intend to get into the specifics of my bill. Suffice it to say that it does parallel the staff draft which is being considered by the committee both as to its general intent and insofar as many of its specific provisions are concerned.

And for that reason, Mr. Chairman, I just cannot overemphasize how pleased I am that you are pursuing these hearings.

The need for this kind of legislation was first recognized by the Federal Government in 1976 when the Interagency Task Force on Product Liability was formed. That task force issued a report which recognized at least two distinct causes of the problem. One was the tort litigation system and the other the insurance ratemaking process.

Even though a model code was adopted by that task force, no State has adopted it fully. However, Congress did adopt the Product Liability Risk Retention Act, which is addressed solely to the insurance aspects of the problem.

This process was significant, however, Mr. Chairman, because it amounted to the first recognition by Congress and the administration that product liability is in fact an issue which warrants Federal attention. I think now we see that there is a recognized need for Federal remedies to the problem.

As the Chair well knows, historically product liability law has been permitted to develop at the State level. The last few years have witnessed changes in product liability tort law, many of which are desirable, and which neither the staff proposal nor H.R. 5214 purport to reverse.

I think we all recognize the social desirability of eliminating the requirement of priority of contract and providing strict product liability for construction defense. However, product liability tort law has evolved well beyond that point. At present, under the laws of some States it is possible for a manufacturer to be held liable for damages caused by the product despite misuse or other unforeseeable alterations and modifications by the product user. Similarly, manufacturers of capital goods are often sued for injuries caused by products made over half a century ago and sometimes longer. In fact, in some States it is possible for a claimant to recover damages against a specific manufacturer without needing to show that the manufacturer made the product that caused the injury.

Thus, rather than being a compensation system based on fault, product liability law is evolving into an insurance system. If this trend continues, manufacturers will end up as insurers responsible for all harm caused by their product. Certainly, Mr. Chairman, this trend must be reversed.

I will not recount specific horror stories that abound in the area of product liability. There are many outrageous examples where manufacturers and product sellers were forced to defend and sometimes found liable for claims that defy all sense of fairness and equity. And the situation is exacerbated by the fact that there is little that any State acting by itself can do to redress these problems.

In our Nation today manufacturers situated in one State routinely ship their products across the country into many different States. It is difficult and nigh impossible for any one State to change its law to protect its manufacturers. Were a State to adopt a more reasonable law, it would only penalize its citizens vis-a-vis citizens of other States with more liberal laws, since its manufacturers would continue to be subject to the more liberal laws of the other States when their product caused injury in those other States.

In this connection it should be noted that product liability insurance rates are not determined on a State-by-State basis; rather, national rates are established on the basis of nationwide experience. It is also worthwhile to mention that neither H.R. 5214 nor the staff proposal provide for any Federal expense or bureaucracy. Moreover, both proposals contemplate that those cases presently decided in State courts will continue to be decided there. An independent basis for Federal jurisdiction such as diversity will be required to exist before the Federal district courts will get involved.

Mr. Chairman, again I compliment you on these hearings and offer my fullest support for your effort. If either I or my staff can assist you in any way, I would hope that you would call upon me.

Thank you.

Senator **KASTEN**. Congressman Shumway, thank you first of all for your statement, and for supporting our efforts in the Senate to develop uniform product liability legislation. As you know, the Senate hopes to come up with a bill that will address the major problems in product liability law while at the same time striking an acceptable balance among the interests of consumers, manufacturers, and insurers.

And as you already know, I hope to work with you and your colleagues in the House toward the development of a bill that achieves such a goal. It is our hope that from the staff draft and these hearings we will in fact have a bill. Congressman Dingell, who is the chairman of the House Commerce Committee, has expressed an interest in product liability, and as you know, the reform effort is likely to be joined by Congressman Waxman, Congressman Broyhill, and a number of others. I look forward to working with you as we develop a consensus.

I was particularly pleased that you referred to our success last year in the Risk Retention Act which we hope to parallel this year by success in this area. As you know, both the House and the Senate worked together, introducing identical bills. By openly working with all of the affected groups—the insurance groups, the manufacturing groups, and others—we were able to develop essentially a consensus bill which then had an outstanding opportunity for passage. In fact, it nearly passed both Houses unanimously.

I am not sure that we are going to be as lucky with this, but that is the direction that we are going, trying to keep all of the different parts together; and as we did in risk retention, working with as many different people as we can.

So once more, I look forward to working with you as well as members of the Commerce Committee as we develop a bill which can have strong bipartisan and strong support.

Thank you very much for your testimony here this morning.

Mr. **SHUMWAY**. Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF HON. NORMAN D. SHUMWAY, U.S. REPRESENTATIVE FROM CALIFORNIA

Mr. Chairman, I am delighted to be here this morning and commend you for pursuing this inquiry into the tort aspects of the product liability problem.

Your staff work prefatory to these hearings has been excellent. Beginning last year with its first working draft, your staff has obviously been hard at work synthesizing the thousands of pages of comments received to produce its second version two weeks ago.

These hearings signal to the business community that apart from the preparation of discussion drafts, you are ready to get down to business, and I heartily applaud your efforts.

As you know, in the House, I am the sponsor of H.R. 5214, a bill which also provides for a federally preemptive product liability tort law. Given the purpose today's hearing—to spell out the parameters of the product liability problem, and to investigate the need for a federal solution—I do not intend to get into the specifics of that proposal. However, suffice it to say that it parallels the staff draft, both as to its general intent, and in many of its specific provisions. Therefore, I cannot over emphasize how pleased I am that you are pursuing these hearings.

Let me take a few moments to review the most substantial record that has been made in past Congresses and Administrations spelling out the dimensions of the product liability problem.

The federal government's involvement in product liability dates back to 1976, and perhaps can be divided between the Executive Branch and Congress. It was prompted by the difficulties which many firms—especially small firms—faced in obtaining product liability insurance coverage during mid 1970's.

Considering the Executive Branch first, in 1976, President Ford convened an Interagency Task Force on Product Liability. This consisted of 13 government agencies chaired by the Department of Commerce. In October 1977, the Task Force published a massive final report which examined the tort, insurance, and safety aspects of product liability. The report concluded that there were at least two distinct cause of the product liability problem—the tort litigation system and the insurance rate making process.

Subsequently, the Task Force prepared the Uniform Product Liability Act (UPLA), designed to remedy the tort aspects of the problem. Pursuant to instructions from the Carter Administration, this Act was drawn as a suggestion for voluntary adoption by the states. A preliminary draft of this Act was published for public comment in January of 1979; and a final version, synthesizing thousands of pages of comments was released in October 1979. Nonetheless, to date, no state has adopted it fully. (I should note in passing that this proposal might be called the "grandfather" of both H.R. 5214 and the Senate working drafts, since both bills are to a significant extent patterned after UPLA).

In addition, the Task Force conceived the Product Liability Risk Retentin Act adopted earlier this year, and authored a report critically examining product liability insurance rate making methods.

Congressional consideration of the product liability problem paralleled that of the Executive Branch. During the period for 1976 through 1978, Senator Culver's Small Business Subcommittee compiled a four volume hearing record studying product liability. At the same time that Senator Culver was holding his hearings, Congressman LaFalce's House Small Business Subcommittee was also reviewing product liability. In addition to compiling a five volume hearing record, this latter Subcommittee—of which this Subcommittee's Chairman was a member—issued a report confirming many of the Task Force's findings. However, unlike the Carter Administration, that Subcommittee recommended the adoption of a federal product liability tort law to preempt state law where inconsistent.

These "exploratory" congressional hearings gave way to legislative hearings commencing in 1979. In the House, the Consumer Protection Subcommittee the House Commerce Committee—in hearings chaired by Congressman Preyer and Broyhill—considered proposals addressed to both the insurance aspects and the tort aspects of the tort liability. During the 96th Congress, it reported out the Product Liability Risk Retention Act—which did not then clear the Senate—but which was adopted into law in 1981.

After it completed its work on the Product Liability Risk Retention Act, however, that subcommittee turned its attention to tort reform. It held several hearings considering this issue which ultimately resulted in H.R. 7921, and amalgamation of substantive provisions drawn from UPLA and H.R. 5626. However, this proposal—H.R. 7921—was never reported out by the subcommittee.

Until now, Mr. Chairman, the Senate's legislative hearings never focused on the tort aspects of the problem. Rather, apart from Senator Culver's hearings, the Senate has concerned itself principally with considering the Product Liability Risk Retention Act.

* * * * * * *

While the Product Liability Risk Retention Act was addressed to the insurance aspects of the problem, its enactment is significant for the tort aspects as well. First, it represents recognition by Congress and the Administration that product liability is in fact an issue warranting federal attention. The Act's proponents made clear throughout Congressional consideration of the Act that it was designed to address only the insurance aspects of the problem; it would do nothing to ameliorate the uncertainty and inequity in the tort-litigation system. Second, and equally significant, the Product Liability Risk Retention Act preempted state laws to the extent that they would prohibit the operation of product liability risk retention groups. Thus, it can be said that both the need for federal remedies to the product liability problem, and the need to preempt state laws to effectuate such remedies, has already been established—both within Congress and by the Administration.

As there is thus clearly precedent for a federal product liability law, let me take a few moments to explain the unique nature of the tort aspects of the product liability problem warranting federal intervention.

As the Chair well knows, historically, product liability law has been permitted to develop at the state level. The last decades have witnessed changes in product liability tort law, many of which are desirable, and which neither the staff proposal nor

H.R. 5214 purport to reverse. We all recognize the social desirability of eliminating the requirement of privity of contract, and providing strict product liability for construction defects. However, the tort law has evolved well beyond that point.

At present, under the laws of some states, it is possible for a manufacturer to be held liable for damages caused by the product despite the negligence, misuse, or other unforeseeable alterations and modifications by the product user. Similarly, manufacturers of capital goods are often sued for injuries caused by products made over half a century ago and some times longer. In fact, in some states, it is possible for a claimant to recover damages against a specific manufacturer without needing to show that the manufacturer made the product that caused the injury. Thus, rather than being compensation system based on fault, product liability law is evolving into an insurance system. If this trend continues, manufacturers will end up as insurers responsible for all harms caused by their product. This trend must be reversed.

Mr. Chairman, I will not recount specific horror stories that abound in the area of product liability. I will leave that for the other witnesses this morning. However, the record made in the previous Congressional hearings that I referred to earlier—the Culver hearings, the LaFalce hearings, and the Peyser-Broyhill hearings—are all replete with outrageous examples of where manufacturers and other product sellers were forced to defend, and sometimes found liable for, claims that defy all sense of fairness and equity. And the situation is exacerbated by the fact that there is little that any state, acting by itself, can do to redress these problems.

In our nation today, manufacturers situated in one state routinely ship their products across the country into many different states. It is difficult—neigh impossible—for any one state to change its law to protect its manufacturers. Were a state to adopt a more reasonable law, it would only penalize its citizens vis-a-vis citizens of other states with more liberal laws, since its manufacturers would continue to be subject to the more liberal laws of the other states when their product caused injury in those other states.

In this connection, it should be noted that product liability insurance rates are not determined on a state-by-state basis; rather, national rates are established on the basis of nationwide experience.

It is also worthwhile to mention that neither H.R. 5214 nor the staff proposal provide for any federal expense or bureaucracy. Moreover, both proposals contemplate that those cases presently decided in state courts will continue to be decided there; an independent basis for federal jurisdiction—such as diversity—will be required to exist before the federal district courts will get involved.

Mr. Chairman, I compliment you on these hearings, and offer you my fullest support for your effort. If either myself or my staff can assist you in any way, I would hope that you would call upon me.

Senator **Kasten**. The next witness will be Mr. Victor E. Schwartz, who is counsel to the Product Liability Alliance.

Mr. Schwartz.

STATEMENT OF VICTOR E. SCHWARTZ, COUNSEL, PRODUCT LIABILITY ALLIANCE

Mr. **Schwartz**. Mr. Chairman, I want to thank you and your staff for the attention you have given to this problem and the very conscientious care you have taken in approaching a very, very complex subject, but one that is in need of action and action now.

I am here today on behalf of the Product Liability Alliance, which is a newly formed group of more than 150 businesses and trade associations that is a cross-section of the entire product liability process. It includes small, medium and large businesses; manufacturers, wholesalers-distributors and retailers; insurers and insurance brokers. All members of the alliance support the enactment of balanced and effective Federal product liability law.

I have observed the product liability problem from a number of perspectives: as a professor of torts for 14 years, as a Government official when I chaired the interagency task force on product liability, and now as a practicing lawyer. It is a problem whose history dates back to the sixties but which became serious in 1975 and will be much more serious in the future unless action is taken now.

Let me share with you briefly some background about the product liability problem. Product liability law, simply put, is a set of rules governing a product seller's responsibility for harm caused by his products. These rules are established almost exclusively by judges in State courts in cases arising after an accident has occurred. As a result, these rules not only vary widely from State to State, but they also are applied retroactively, making law even in a single State almost totally unpredictable.

The slow evolution of tort law in the United States accelerated dramatically in the 1965 to 1975 decade, spawning new and diverse theories of liability. In 1975 to 1977 insurance rates rose for many businesses, especially smaller ones. The interagency task force found on the average that insurance rates increased over 300 percent in the diverse areas of products it studied.

The task force conducted an 18-month study and found three causes that could be addressed by legislative action. One cause of the problem that has been adverted to by previous witnesses was overly subjective insurance ratemaking practices. Insurers simply did not have enough data to set rates accurately. Sometimes rates were too high, sometimes too low.

To address this part of the problem the Department of Commerce developed the Risk Retention Act which, after refinements and improvements by your committee, became law last year. By providing product sellers with competitive alternatives to commercial insurance, it put to rest now and for the future the insurance ratemaking aspects of the product liability problem. If product liability insurance rates become in any way unfair or unreasonable, product sellers will have a convenient self-insurance and group insurance alternative.

The other principal causes of the product liability problem identified by the task force were unsafe manufacturing practices and uncertainties in the tort system. To address these the task force developed in 1979 the Uniform Product Liability Act, known as UPLA, which was to serve as a model for the States. Unfortunately, the model for the States approach has not worked. Some States adopted portions of UPLA, other States adopted other portions, but there is no uniformity at all.

With respect to incentives for making safe products, States differ as to fundamental rules. For example, approximately 47 States say that evidence that will show improvements of products where a person has taken the time and care to improve the safety of his product cannot be used against him with regard to older products, but at least three States say yes, that evidence can come in. So a manufacturer who has to plan for a nationwide distribution is put in a quandary as to what to do.

The overwhelming majority of States follow the rule that a plaintiff has to show who made the product that injured him. On the other hand, one State says that a seller may be liable for products that might have been made by someone else. An insurer, whether it self-insurance or otherwise, really has enough trouble estimating its insureds' risks. These decisions allow it or require it to estimate risks of products made by someone other than its own insureds.

Product liability has spawned decisions that are simply unfair to all parties, and you will probably hear dozens of examples in the next few days, but I thought I would just mention one or two.

In a recent Maryland case a manufacturer of a commercial laundry dryer which had worked well for 18 years was found liable for a substantial amount of damages when someone attempted to dry a huge hot air balloon in the machine. The dryer simply was not made for that purpose, and the machine disintegrated, and the plaintiff was injured.

In another case a car manufacturer was held liable when a tire came apart in a vehicle that was being driven more than 100 miles an hour.

The law has become so complex that it is a trap for the unwary, and many cases can be found with plaintiffs having legitimate claims barred because of the snafu of product liability laws.

A fair and effective stabilization of product liability law, as Senator Glenn suggested, is in the interest of all groups concerned about the problem. It will enable manufacturers, retailers and wholesalers to have a better understanding of what their obligations are. It will bring increased accuracy to the process of setting insurance rates, whether it be by risk attention groups or by commercial insurers.

Today even the greatest of experts cannot predict what product liability law will be in the future. The result is that injured consumers who want to know their rights are totally dependent on lawyers. Consumers are entitled at least to have a basic idea of what their rights are. Such knowledge will, among other things, enable them to assess the reasonableness of charges for legal services that they receive in product liability actions.

Consumers have also been affected by the crisis atmosphere in the passage of some State legislation. These statutes have little effect on the product liability problem.

Finally, a uniform law will reduce the enormous transaction costs that you referred to in your opening statement—costs which are usually passed on to the consumers in the form of higher prices.

When I was with the Federal Government in 1979 the Office of Management and Budget decided that the Uniform Product Liability Law was more appropriate for the States to adopt than to be considered by the Federal Government. What were the reasons for this?

Well, first, tort law has traditionally been a State province. Second, it was thought that the States should be given an opportunity to develop uniform product liability law on their own. And finally, it was thought that the insurance ratemaking issue should be addressed first.

The underlying bases for these assumptions are reasons which were valid in 1979 but are no longer valid today. The insurance ratemaking problem has been addressed by you and your committee through enactment of the Risk Retention Act, so any savings or stabilization that would come about from the enactment of Federal tort law will be passed on to insureds and their customers.

As far as the hunt for uniformity, the hunt has been a failure. The States are a total crazy quilt, diverse pattern of law. The

States should not be blamed for failing to address the product liability problem. It simply cannot be done by a State in a comprehensive way. Even if a State adopted a comprehensive statute such as that that is reflected in staff draft 1 or 2, the fact remains that products are manufactured nationwide. This fact is reflected in the way product liability insurance rates differ from almost every other area of insurance—medical malpractice, auto, and almost all other liability insurance rates. They are set on a State-by-State basis.

Products are mobile. Gov. John Carlin recognized this when he vetoed a product liabilty law. He observed that 90 percent of the products manufactured in Kansas were shipped out of State. He said unless a law is passed on the Federal level, only a small number of Kansas businesses would benefit from the statute that was proposed.

The only reason left to bypass Federal action is tradition, but tradition has now become a major impediment to both interstate and foreign commerce. Old customs must now bend to the facts of a modern society. Federal legislation preempting State law and setting forth uniform nationwide rules of liability would bring greater predictability and stability to litigation and to the insurance ratemaking practice.

Today, as you mentioned in your opening statement, for every 6 cents a consumer receives in damages, 7 cents is spent for lawyers.

Those opposed to Federal action have argued that no action is necessary, that the problem is not with fluctuating legal rules but it is with insurance ratemaking practices and faulty manufacturing practices. But this committee has addressed the insurance ratemaking part of the problem, and the staff has produced a draft law which squarely addresses poor manufacturing practices by imposing liability upon a manufacturer when he has made unsafe products.

It is argued also that a statute will be subject to construction and different views in different States. Well, with any statute there is going to be diversity of view. That argument was made against having any Federal rules of evidence and simply leaving it to common law. But common sense and experience shows that a statute covering an area such as this will bring more stability than we have today.

It has also been said that product liability law has to mesh with other laws, but careful refinement of the statute can bring about that, too. This would be true with a State product liability statute as well.

It has also been said that somehow this legislation is going to be seized upon by one interest group or another, but the staff and the committee has shown already that it has heard a variety of points of view, and that can be seen by an examination of the differences between staff draft 1 and staff draft 2.

Finally, as with any legislation, the camel's nose argument is made. Apparently, there are a lot of camel's noses in Washington. But one can say here that a line and watershed can be drawn at the product liability line level. Other areas of tort law such as slip and fall cases are simply not the same: they do not even begin to have the same interstate and foreign commerce impacts.

Staff draft 2 is generally in accord with general fundamental principles of product liability law. It does not attempt to set up a compensation system. It attempts to fix responsibility on the parties who can best avoid a harm.

Thank you for your time and attention.

Senator **Kasten**. Thank you very much, Mr. Schwartz.

You suggested that the Risk Retention Act would solve part of the product liability problem. There are some who believe that we should wait and see if this act will bring enough stability into the area so that we would not need to take this next step.

How do you respond to that? Do you agree?

Mr. **Schwartz**. Every government body—the Federal Government, the five States that studied the product liability problem—identified two separate causes of the problem, the first being insurance ratemaking practices, and that has been resolved. The other is uncertainties in the tort system. The Risk Retention Act with all of its benefits does nothing to address the uncertainty in the tort system part of the problem. Self-insurers will have the exact same problem that commercial insurers have, and that is a total inability to predict the future.

Senator **Kasten**. In other words, we need to take the next step and to take it now?

Mr. **Schwartz**. That is correct. And the two steps merge together and help to resolve a complicated problem.

Senator **Kasten**. Now, toward the end of your statement you mentioned the fact that we are not necessarily creating a new set of laws, and specifically, it is my understanding that the subcommittee's second draft is essentially in accord with majority case law.

Is that your view?

Mr. **Schwartz**. A substantial portion of the draft is in accord with what might be called the majority rule in the United States in tort law. There are some occasions when the staff draft has taken a minority view, but as the section-by-section analysis produced by the staff shows, when a minority view was taken, specific rationale and reasons were set forth.

Senator **Kasten**. As you know from some of our previous conversations, one of my overall concerns in Government philosophy is concentration of power, whether it is big Government or big business or big labor or whatever. It seems to me that the lack of adequate product liability information and the lack of adequate product liability insurance or, in some cases, high rates is having the effect of fencing out small initial entry companies.

In other words, if you and I were to go into a machine tool company or you and I were to, let's find something controversial, if we were to start to manufacture some kind of medicine or drug, we might be able to find the banker that would lend us the money. We might have the expertise. We could maybe go and hire a couple of hot young druggists from a major drug company. We could put together a company, but we could be prevented from entering the industry because, having no track record, it would be difficult or impossible to get the kind of products liability insurance that we would need in order to get the bank loan necessary to proceed.

Other examples we can point to that demonstrate the lack of product liability uniformity and the lack of product liability insurance have in fact resulted in small business people being fenced out of several growing areas of our economy.

Mr. SCHWARTZ. The task force that studied the problem found that it is particularly acute for smaller businesses although we cannot cite or could not cite examples as the one you posed because in a sense it is very difficult to find out about them, since they are not now in business and there was no way to survey somebody who had not yet gone into business.

The experience with smaller businesses and smaller businesses that want to expand into new areas suggests that your hypothesis is correct. When there is no track record and somebody wants to introduce a new product, (a) they probably do not have enough capital to self-insure, (b) in light of the fact that rules may be constantly changing, commercial insurers may hesitate to take a chance on a totally unpredictable risk.

Senator KASTEN. One of the other questions that has come up over the past several months as we worked through these drafts is the idea that the uncertainty in this area, resulting from the lack of uniform Federal standards, is having the effect of being a disincentive toward new, improved or particularly safer products. In other words, there have been recent occurrences of the 1980 or 1981 product being used to show that the 1970 product was unsafe or manufactured less than properly.

Are we correct in assuming from the of basic information that we have been receiving, that the lack of uniformity in this area is having the effect of hampering the introduction of newer, more efficient, or even safer products simply because people are hesitant to put a product, a product line, or a product improvement on the market if it can in turn be used against the previous product which they have been marketing for 10, 20, or 30 years?

Mr. SCHWARTZ. The task force found that to be a fact and today some of the changing rules are going to make it worse. When a manufacturer is considering a new innovation, he has many considerations in mind—marketing, competition, cost—but now he has to also consider product liability.

If you have two manufacturers, one of whom improved his product and put a new safety device on it and the other decided not to, and then subsequently you had a case against both of them with older products, the person who put and invented and created a new incentive for safety would be in a worse situation in two of our largest States than the person who sat back and did absolutely nothing.

[The statement follows:]

STATEMENT OF VICTOR E. SCHWARTZ ON BEHALF OF THE PRODUCT LIABILITY ALLIANCE

Mr. Chairman and members of the Subcommittee: Thank you for your very kind invitation to discuss the product liability problem, and whether federal action in the area of tort law is necessary to resolve that problem.

I am here today on behalf of the Product Liability Alliance, a newly-formed group of more than 150 business and trade associations that is a cross-section of the entire product liability process. It includes small, medium and large businesses; manufacturers, wholesalers-distributors, and retailers; insurers and insurance brokers. All members of the Product Liability Alliance support the enactment of balanced and effective federal product liability law.

I have observed the product liability problem from many viewpoints—as a law professor in the field or torts, as a government official when I chaired the Interagency Task Force on Product Liability, and as a practicing lawyer. It is a problem whose history dates back to the early 1960's, but which became serious in 1975 and will be much more serious in the future unless federal action is taken now.

Let me share with you, briefly, some background facts about the product liability problem.

Product liability law, simply put, is the set of rules govening a product seller's responsibility for harms caused by his products. These rules are established almost exclusively by judges in state courts in cases arising after an accident has occurred. As a result, these rules not only vary widely from state to state, but also are usually applied retroactively, making law even in a single state unpredictable.

The slow evolution of tort law in the United States accelerated dramatically in the 1965–1975 decade, spawning new and diverse theories of liability. In 1975–1977, insurance rates rose for many businesses, expecially smaller ones. The Interagency Task Force found an average increase of over 300% in the diverse product areas it studied.

The Task Force conducted an intensive 18-month study of the problem and found three causes that could be addressed by federal legislation.

One cause of the problem was overly subjective insurance ratemaking practices. Insurers simply did not have enough data to set rates accurately. Sometimes rates were too high, sometimes too low. To address this problem, the Department of Commerce developed the Risk Retention Act which, after refinements and improvements by this Committee, became law last year. By providing product sellers with competitive alternatives to commercial insurance, it put to rest, now, and for the future, the insurance ratemaking aspects of the product liability problem. If product liability insurance rates, which have stabilized over the past three years, ever again become in any way unfair or unreasonable, product sellers will have convenient self-insurance and group insurance aternatives.

The other principal causes of the product liability problem identified by the Task Force were unsafe manufacturing practices and uncertainties in the tort system. To address these, the Task Force developed in 1979 the Uniform Product Liability Act (UPLA), which was to serve as a model for the states to use in codifying the obligations of product sellers and the rights of persons injured by defective products. Unfortunately, this approach simply has not worked. While some state have adopted portions of UPLA, the legislative picture at the state level is, if anything more confusing now than before UPLA. Indeed, it is a crazy quilt of conflicting laws. Let me mention just a few examples.

First, with respect to incentives for safer manufacturing practices, states differ as to whether a product seller's efforts to improve his product and make it safer after an accident can be used against him in product liability cases. Forty-eight states believe that the law should encourage product safety and prohibit the use of such evidence. However, two major states, New York and California, admit the evidence. As a result, product sellers, whose products may cause injury in any state of the Union, including New York and California, may hesitate to develop new safety devices on their products. Indeed, fear that evidence of such innovation could be used to prove liability for products made many years before the improvements were even conceived of operates to retard product improvement.

Second, the overwhelming majority of states follow traditional tort law and require that the plaintiff show who made the product that injured him. But at least one state, California, has ruled that a seller may be liable for products made by someone else. An insurance entity, whether it is a self-insurance vehicle or a commerical insurer, must now try to estimate the potential risks not only of its own insureds but of unknown others.

Third, product liability law has spawned decisions that are simply unfair to all parties. In a recent Maryland case, for example, a manufacturer of a commercial laundry dryer, which had worked well for 18 years, was found liable for a substantial amount of damages when someone attempted to dry a huge hot air balloon in the machine.[1] The dryer simply was not made for that purpose and it disintegrated, injuring plaintiff. In another case, a car manufacturer was held liable for harm that was caused when a tire came apart on a vehicle being driven at more than 100 miles per hour.[2]

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[1] *American Laundry Machinery Industries* v. *Horan*, 45 Md. App. 97, 412 A.2d 407 (1980).

[2] *Le Bouef* v. *Goodyear Tire & Rubber Co.*, 623 F. 2d 985 (5th Cir. 1980).

Finally, the law has become so complex that it is a trap for the unwary, and plaintiffs with legitimate claims may go uncompensated.

The Case for a Uniform Product Liability Law.—A fair and effective stabilization of product liability law is in the interest of all groups concerned about this problem. It will enable manufacturers, retailers, wholesalers and distributors to understand what their obligations are in the design, manufacture and sale of products. It will bring increased accuracy to the setting of insurance rates. And, it will allow consumers to know what their rights are.

Today, even the greatest experts cannot predict what product liability law will be in the future. The result is that injured consumers who want to know their rights are totally dependent on lawyers. Consumers are entitled to have at least a basic idea of what their rights are. Such knowledge will, among other things, enable them to assess the reasonableness of charges for legal services they receive in product liability actions. Consumers have also been affected in this crisis atmosphere by some state statutes. As will be indicated later, these statutes often have little effect on the product liability problems. Finally, a uniform law will reduce the enormous transaction costs of the product liability system, costs which are usually passed on to the consumers in the form of higher prices for products.

The Case for Federal Action.—In 1979, Office of Management and Budget officials decided UPLA was more appropriate for adoption by the states than for enactment by Congress. Their reasons were threefold. First, tort law has traditionally been left to the states. Second, it was thought that states should be given the opportunity to adopt uniform product liability laws on their own. Finally, it was thought that the issue of insurance ratemaking should be addressed first.

The underlying bases for these assumptions are no longer valid. First, the insurance ratemaking aspect of the problem has been addressed through the enactment of the Risk Retention Act, so that any savings or stabilization wrought by the enactment of uniform tort law will be passed on by insurers or self-insurers to persons who buy products. Second, the states have not acted uniformly in the enactment of product liability law. Thirty-one states have passed some form of product liability statute, and none is the same. Practically none of these are comprehensive laws, and only touch a few product liability issues.

The states should not be blamed for failing to address the product liability problem effectively. Because of the interstate nature of product manufacturing and distribution, it is almost impossible for states, either through case law or statute, to address the product liability problem in a meaningful way. Even if an individual state develops a comprehensive approach to liability issues, such as is reflected in Staff Draft No. 1 and No. 2, the fact remains that products manufactured in that state are sold and used on a nationwide basis. This fact is reflected in the way product liability insurance rates differ from medical malpractice, auto, and almost all other liability insurance rates which are set on a state by state basis. Because some products are mobile and can give rise to liability in the state of manufacture, the state of sale, or the state of use, product liability rates must be set on a countrywide basis.

Governor John Carlin of Kansas made this very point in vetoing a product liability law in his state. He said, "Current economic data indicate that approximately 90 percent of the products manufactured in Kansas are purchased out-of-state, and a similar percentage of goods used by Kansans are manufactured in other areas. Consequently, unless a law is passed on the federal level, or Kansas law corresponds to legislation in other states, only a small number of Kansas businesses could benefit." [3]

While the actual percentage of goods sold out-of-state might vary a bit, the same general statement would be true in respect to each of the states.

Thus, the only reason left to bypass federal action is tradition. But that tradition has now become a major impediment to both interstate and foreign commerce, and old customs must bend to the facts of a modern society.

Federal legislation preempting state law and setting forth uniform, nationwide rules of liability would bring greater predictability and stability to the litigation process and to product liability insurance rates. It would reduce the horrendous litigation costs that we have today. Insurance data show that for every 66 cents a consumer receives in judgments, 77 cents is spent for lawyers.

Those opposed to federal action have argued first that no such action is necessary, on the theory that the problem is not the fluctuating legal rules applied in the courts, but overly subjective insurance ratemaking practices and faulty manufacturing practices. But, this Committee has already addressed the problems of insurance ratemaking practices, and the insurance industry's business customers agree that the insurance problem is over and done with. Moreover, the Staff has produced a draft law which squarely addresses manufacturing practices by imposing liability upon a manufacturer who has been at fault in making an unsafe product.

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[3] Veto message by Governor Carlin, April 24, 1980.

Second, it is argued that a federal law would not produce certainty or stability in the system because courts and juries in the various states would still be called upon to resolve important questions and, depending how they are resolved, determine the outcome of individual cases. Although the state courts and juries would be required under a federal law to apply a uniform standard of liability, they may come to different conclusions after applying that standard. This is true of any statute. For example, the Federal Rules of Evidence enacted by Congress in 1975 have been subject to a great deal of judicial interpretation. However, no one could honestly desire to revive the old system of inconsistent and unpredictable common law evidence rules in the Federal Courts. A Uniform standard drafted with the precision and care evident in Staff Draft No. 2, will go far toward improving the present climate of almost total uncertainty caused by the application of retroactive, non-uniform rules in the various states. It is absurd to suggest that because complete certainty cannot be legislated, the most effective step toward that certainty should not be taken.

Third, it is argued that federal legislation in the area of product liability tort law will not mesh with other areas of tort law at the state level. Again, careful drafting can avoid this problem. Both Staff Draft No. 1 and Staff Draft No. 2 focus exclusively on product liability actions. They do not reach into other areas of law. There are no arbitration procedures or new procedural devices that are not part of traditional state law.

Fourth, it is argued that federal legislation will have a bias that may be pro-consumer or pro-product seller. In that connection, the very open process which is being used by this Subcommittee is the best way to achieve legislation that is balanced and fair. The Staff Draft has built upon the work of the past and set in motion a totally democractic means of developing legislation. There is proof of this in the Staff's consideration of both consumer and product seller comments in the evolution from Staff Draft No. 1 to Staff Draft No. 2. These hearings, of course, will provide further guidance.

Fifth, it is argued that somehow product liability legislation will open the door for federal legislation in other areas of tort law. But the "camel's nose" argument is simply fallacious in this case. There is no federal interest in entering into ordinary tort cases such as slip and fall or medical malpractice, which are merely of local concern.

Finally, if there is a need to observe "tradition," there is ample precedent for federal action where national, uniform standards have been necessary to promote or facilitate interstate commerce. I would be pleased to supply the Committee with background material on this subject.

In light of the fact that federal action is necessary, the approach of the Staff Draft represents a limited form of federal action; nevertheless, it can be effective. The draft does not require the expenditure of federal funds. The Staff Draft sets forth standards of liability which will be implemented by state courts. It would put to rest the jumble of product liability law that now impedes interstate commerce.

While different constituent groups will speak to the detailed content of the draft, I would observe that it recognizes a fundamental principle about product liability law. Product liability tort law should not be a compensation system. If it were, a product seller would always be liable for harms caused by his product; that is the system that is used in workers' compensation. Product liability tort law is intended to focus responsibility on the party or parties who, if they had acted reasonably, could have done something to prevent a harm.

Staff Draft No. 2 is generally in accord with this principle and with the guidelines set forth by the Federal Interagency Task Force on Product Liability.

In summary, the business community seeks a balanced law at the federal level, one that will improve the current liability climate and put to rest a problem that is a virulent impediment to interstate commerce.

Thank you.

Senator KASTEN. I would like to, first of all, thank you for your testimony this morning. As we work through this second draft, it is those two points in particular—the idea that we are discouraging efficient development of new and safer products and that second we are fencing out small initial entry companies—that I feel particularly strong about. Those are the two points that I want to be sure we address as we work our way through this second draft, hopefully arriving at products liability legislation that will prove acceptable to both Houses.

I thank you for your help and for your testimony here this morning. I would like to ask, if you would, that you remain at the table. I would like at this time to ask Professor Phillips and Professor Henderson to come forward and join Mr. Schwartz. After we have heard brief testimony from both professors, we will then possibly ask all three of you as a group to answer questions.

Prof. Jerry Phillips is from the University of Tennessee School of Law in Knoxville, Tenn. Prof. James A. Henderson is from Boston University School of Law in Boston, Mass.

Professor Phillips, if you could go forward with your statement, and then that would be followed by Professor Henderson's and then we would ask questions.

Prof. Jerry Phillips.

STATEMENT OF PROF. JERRY J. PHILLIPS, UNIVERSITY OF TENNESSEE SCHOOL OF LAW

Mr. PHILLIPS. Thank you, Senator Kasten. I am pleased to be here. I am from the University of Tennessee, where I am a professor of law. I have reviewed both committee draft No. 1 and committee draft No. 2. My basic position is in opposition to such legislation. We have a similar statute in Tennessee which we have had on the books now for about 2 years and I think it has created more problems than it has solved.

One point I would like to make is that many of the rules that are addressed by this proposed legislation are not new in the law of torts. They have been with us for a very long time. Strict liability in warranty, liability for obviously unreasonable dangerous defects, the effect of subsequent remedial measures—all of these rules are longstanding rules in law and it is difficult for me to understand why the problem, if there is a problem, has arisen within the past decade or so, attributable to these rules, which are not new in the law.

I would also point out that although something like 20 States, including my home State, have enacted some form of product liability legislation, the major States have not, although it has been considered and has been rejected. The States, for example, such as New York, Pennsylvania, Ohio, California, Texas, Illinois all considered the legislation very carefully, similar to this, similar to the Uniform Product Liability Act, and found it to be unacceptable.

It would seem to me that it would be unwise for Congress to enact legislation that has been rejected by the major population and commerce States of the Nation.

As to the question of uniformity, I understand one of the great goals of legislation such as this would be to achieve uniformity in the law. I seriously doubt that that would occur where the major bulk of construction of the statute would be in the State courts.

As you well know, statutes are capable of considerably diverse interpretations by different courts. I don't think the comparison with the Federal Rules of Evidence is comparable, because the Federal Rules of Evidence are tried in the Federal courts with a uniform interpretation by the U.S. Supreme Court to maintain consistency. I doubt very seriously that the U.S. Supreme Court would grant certiorari jurisdiction to any product liability cases coming up through this act.

Moreover, with regard to the present state of the tort law, I personally do not find the decisions to be unacceptable. In fact, I find the vast majority of decisions that have been handed down through the courts that are reported, that I am familiar with, to be, on the whole, reasonable. I have faith in our jury system and in our court common law system.

I think, for example, that the decision that has perhaps caused some of the most consternation—the DES case out in California—has been followed in several other States now already with DES and other products. The reasoning of the decision is that if a manufacturer has made 15 percent of the defective products, more likely than not he has caused 15 percent of the injuries. That is not an unreasonable position, it seems to me, for a court to take.

This statute also, I think, poses a number of constitutional questions. The statute of repose, if it indeed is a statute of repose, has been attacked on constitutional grounds successfully in a number of States. Comparable statutes have been held unconstitutional. The holding of the retailer liable only when the manufacturer is insolvent or cannot be found it seems to me presents a constitutional question of arbitrariness of classification. Turning over the punitive damage question to the court presents, I think, a question of the right of trial by jury. Indeed, the whole classification of product liability law as a somehow unique area of torts law, I think, presents a substantial constitutional question.

Also, as has been mentioned, traditionally this law has been left to States rights and to the common law development of tort law. I know Victor Schwartz says that this would not be the foot in the door or the camel's nose in the tent, but I think it would. I think it is difficult to distinguish business premises liability cases from product liability cases; for example, I expect in the course of the common law development before long premises liability—business premises liability law—will be included within the parameters of products liability law, as has been the sale and lease of real estate.

And finally, let me say that I do not find in this bill anything that is favorable to the consumer. My concern is primarily with the interests of the consumer, provided the manufacturer is not being unfairly treated. I do not think the decisions to date have been unfair, and I do think that this legislation is not consumer-oriented.

Thank you.

[The statement follows:]

STATEMENT OF JERRY J. PHILLIPS, W. P. TOMS PROFESSOR OF LAW, UNIVERSITY OF TENNESSEE

Mr. Chairman and Committee Members: My name is Jerry J. Phillips. I am a graduate of Yale University and of Cambridge University. I was in private practice of law for six years before teaching and I have taught law since 1967. My areas of speciality are torts, products liability, and evidence. I am the authror of three books, two on products liability and one on torts. I hold the W. P. Toms Professorship at the University of Tennessee, and I am a member of the Phi Beta Kappa Society, the

American Law Institute, and the Tennessee and Federal Bars. I am here at the invitation of this Committee, and not on behalf of any special interest group.

I am opposed to products liability legislation, either at the state or at the federal level. The reason for my opposition is that I believe the decisions in this area as they have developed at common law are for the most part reasonable and sound, and therefore no statutory change is either necessary or desirable. It is very important in the area of torts including products liability that the law remain flexible and capable of healthy development. Statutory regulation has the undesirable effect of freezing and rigidifying the law thus preventing such growth and development. A statute, no matter how carefully drawn, can never anticipate all of the problems that will arise in such a complex area as this, and the result will be that the statute will constitute a stumbling block to the orderly development of the law.

Although products liability laws of varying degrees of regressiveness have been passed in about twenty states, these states have not been the major centers of population and commerce. Thus no such law has been passed in New York, Massachusetts, New Jersey, Maryland, Illinois, Ohio, Texas, California, Pennsylvania, or Georgia, although vigorous attempts have been made by manufacturers to obtain the passage of such legislation in these states. It would ill behoove the federal government to pass such legislation now, when the major states themselves have considered and rejected it.

Tennessee, my home state, is one of the states that passed such legislation, and the statute has created many more problems than it has ever solved. I have heard a number of qualified attorneys from both the plaintiff and defense bars state that our act was both unnecessary and unwise.

It is thought that a federal products liability statute would bring uniformity to the law, but it is by no means clear that this would be the result. Each state would construe the law according to its own interpretation, with resulting wide variations, and it is exceedingly unlikely that the United States Supreme Court would establish uniformity through the exercise of its certiorari jurisdiction. Tort law, moreover, has historically been an area left to state regulation and control.

The doctrice of strict products liability, at least in its warranty form, has been with us for the better part of this century. It is based on the sound policy that the seller holds his product out—by advertising and otherwise—as being reasonably fit for use, and not unreasonably dangerous. It is also based on the idea that in many if not most cases negligence in manufacturing is in fact present but cannot be proven, and the plaintiff should not be saddled with this impossible burden of proof.

Admittedly design cases are complex, but so are many of the disputes that come before our courts and juries today reflecting the complexity of modern society itself. These disputes cannot be simplified without distorting reality. Nor can they safely be turned over to the manufacturer, or to technocracy, for self-regulation. The strength and freedom of this country lie in large part in the independence of its jury system, and that system should not be tampered with lightly or in fear of the unknown.

Most of the proposed legislation is regressive, and designed to protect the manufacturer and seller at the expense of the ordinary user, consumer, and bystander. Some of the proposals may well be unconstitutional, but even if they are not they will be a positive disservice to the consuming public. Knee-jerk legislation should not be enacted to solve an apparent problem that may well lie elsewhere—namely, in the rate-making practices of the insurance industry itself. I understand that industry is well-organized in support of this legislation, and the consumer is notoriously unorganized and unaware of the inroads made upon his or her rights and interests. In this instance, as so often, consumers must rely upon the good sense of judgment and fairness of this Committee, and of Congress, to protect their vital interests.

[The following information was subsequently received for the record:]

THE UNIVERSITY OF TENNESSEE,
COLLEGE OF LAW,
Knoxville, Tenn., March 10, 1982.

Hon. ROBERT KASTEN,
Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR SENATOR KASTEN: I testified before the Consumer Subcommittee of the Committee on Commerce, Science, and Transportation on March 9 regarding proposed Federal products liability legislation, and I would like to add to my remarks.

One of the concerns expressed at that hearing was the high administration costs associated with the litigation of products liability claims today. I am not aware of any accurate figures in this regard, but in any event I believe the proposed legislation if enacted would increase rather than decrease these costs because it would significantly complicate rather than simplify the litigation process.

Two other concerns expressed were that existing products law keeps the would-be small or medium-sized entrepreneur from going into business, and it discourages product innovation. As to the first concern, the present-day economic malaise in this country is attributable to much more pressing economic issues than that of products liability insurance premiums. It was asserted at the hearing, moreover, that the risk retention statute passed by Congress last year has solved the products liability insurance problem. There is no reliable data to indicate that products liability law has had any significant impact on product innovation in this country. Indeed, the existing rules for unavoidably unsafe products are designed to foster such innovation.

The proposed law is very regressive in a number of respects. For example, it reestablishes the patent-danger defense which has been almost uniformly discredited in the courts. It abolishes joint and several liability, which is the overwhelming and long-standing rule of liability in this country. It makes compliance with Federal statutory standards almost conclusive, although it has been long and widely recognized that these standards are merely minimal. It establishes a discovery rule for the statute of limitations for capital goods only.

There are many design cases, such as *Delaney v. Towmotor Corp.*, 339 F. 2d 4 (2d Cir. 1964), where negligence is probably present, but cannot be proven. The proposed bill would deny recovery in such deserving cases.

Finally, I do not think the bill would bring uniformity because it would be construed with widely differing interpretations by the different states. Its major effect would be to restrict the rights of consumers, with no appreciable benefit to manufacturers.

Sincerely yours,

JERRY J. PHILLIPS,
Professor of Law.

Senator **KASTEN**. Thank you, Professor Phillips. Professor Henderson.

STATEMENT OF PROF. JAMES A. HENDERSON, BOSTON UNIVERSITY SCHOOL OF LAW

Mr. **HENDERSON**. Mr. Chairman, I am James A. Henderson, Jr., professor of law at Boston University School of Law. I teach and write primarily in the areas of tort and products liability law. Over the last several years I have acted as consultant to the National Product Liability Council, an association of manufacturers supporting Federal product liability legislation.

Notwithstanding my work for the council, I appear today at your invitation and with the council's knowledge and consent to testify on my own behalf as a legal academic. In the interest of saving time for questions, I shall, with your permission, depart from my written testimony, which I trust will be made part of the record.

Taking his written and oral statements together, Professor Phillips makes two major points—first, that product liability law today is on basically solid ground and doesn't need help from any legislature, State or Federal; and, second, reaching the opposite conclusion from Victor Schwartz, that congressional action is inappropriate in any event.

I happen to think Victor has a better side of the argument on the second point and perhaps we can get into it further in the discussion following my remarks. What I would like to do now is briefly to explain my disagreement with Professor Phillips' assessment that products liability law is alive and well and living happily in the 50 States.

The following picture emerges from his testimony. The product liability system is mostly on solid ground. The rules governing manufacturing defect cases are sound. The rules governing design liability are admittedly more complex, but on balance sound. Trial lawyers from both defense and plaintiff bar like the system the way it is, by and large. And the product liability system is protecting the consumer interest, even as Congress must now protect that system from change.

I disagree with each of these characterizations of our existing product liability system. It is not alive and doing well. It is on a destructive, wasteful rampage, doing serious harm to our economy and ultimately to consumers.

I agree with his conclusion that the existing rules governing manufacturing defect cases are sound. A manufacturing defect causes an individual product to deviate dangerously from the rest of the products manufactured from the same design. Courts can hope with a rule holding the manufacturer strictly liable because there is a built-in standard—the design itself—against which to measure the adequacy of the individual product.

But I do not agree with his conclusion that design cases are merely more complex than manufacturing defect cases. Design cases are an altogether different breed of animal. In a design case where the design itself is under attack, no built-in standard is available. Courts must rely on a very vague concept of reasonableness.

The plaintiff runs a Volkswagen into a bridge abutment. The plaintiff claims his injuries could have been reduced if the front end were more sturdily designed. But adding steel not only adds cost to the consumers, it adds weight and reduces fuel economy. The question comes down to how strong must a front end be to serve the social good.

I submit courts cannot adjudicate consistent answers to that question on an ad hoc, case-by-case basis. And the reason isn't just that the cases are complex. They are that, goodness knows, but they are more. They present profound questions of social ethics that can only be addressed sensibly before the fact of a specific injury. It is not a case of A individual hurts B individual, where the jury can get involved in the very personal rights and duties owing between flesh-and-blood people.

Instead, the interests of a large segment of the car-buying public are at stake. An individual court action simply blows its fuses trying to approach such an issue on an appropriate scale.

Professor Phillips suggests courts are doing this all the time in other areas of tort law. I disagree. Indeed, I will go this far. Show me another area where this is going on as routinely as in product liability and I will show you an area in turmoil.

In truth, what has emerged in the design liability area in recent years is a multimillion-dollar social insurance scheme providing little or no guidance to manufacturers regarding how they should be designing their products to avoid liability.

Now there is nothing wrong, per se, with social insurance schemes, but on any view this particular scheme is a monstrous ripoff of consumers. Out of every dollar paid by consumers to cover the relevant liability costs, less than 50 cents—estimates vary downward from 45 to 30 cents—are returned to consumers in benefits. Most of the rest, between 45 and 70 cents out of every premium dollar, goes to pay the lawyers, adjusters and the like. If this is a social insurance scheme, it is being run primarily to benefit the trial bar.

Professor Phillips—and I will close with this remark—ended his testimony with the observation that existing product liability law protects the consumer and admonishes you to go and do likewise and refuse to enact changes in the law. I urge upon you a different admonition. On any fair view of the present system of products liability dealing with liability for design has broken all bounds of rationality and is on a rampage. If the old admonition about free lunch holds true, the ultimate victims of that rampage will be you and me, the consuming public.

I think the second staff draft is a reasonable, balanced attempt to solve the problems as I see them. Nothing is perfect. It will be subject, I am sure, to change, but I think it deserves our careful consideration.

Thank you.

[The statement follows:]

STATEMENT OF PROF. JAMES A. HENDERSON, JR., BOSTON UNIVERSITY SCHOOL OF LAW

I am James A. Henderson, Jr., Professor of Law at Boston University School of Law. I teach and write primarily in the areas of torts and products liability law. Over the past several years I have acted as consultant to the National Product Liability Council, an association of manufacturers supporting federal product liability legislation. Notwithstanding my work for the Council, I appear today, at your invitation and with the Council's knowledge and consent, to testify on my own behalf as a legal academic.

I shall address four questions: first, do we have a serious products liability problem in this country today? Second, what are the major sources of the problem? Third, what changes in the law are necessary to solve the problem? And fourth, is Congress the appropriate legislative forum to effectuate those changes? To summarize my responses to these questions, yes, I believe we have a serious products liability problem; the major sources of the problem inhere in the inability of courts to construct sensible, consistent standards for deciding design and warning cases; what is required are legislatively enacted, uniform standards to fill this void; and the only forum that can adequately perform this legislative function is the United States Congress.

Why do I believe we have a serious products liability problem? I have two basic sources of information, one theoretical and one practical. On the theoretical side, which I shall explain momentarily when addressing the sources of the problem, my analysis of trends in appellate court decisions led me ten years ago to predict that a slide into chaos was likely. On the practical side, experiences in the intervening ten years have confirmed my worst fears. You cannot read the appellate opinions, or the Interagency Task Force Report, or the newspapers; you cannot talk to manufacturers, including small manufacturers whose businesses are very much in jeopardy, without concluding that something is decidedly wrong with our products liability system. Courts in various states have come up with widely differing standards for judging the adequacy of product designs. Even the best of these standards are so vague that juries are free to, and do with regularity, react purely emotionally, or out of whim. Punitive damages, which once were a special sanction treated with the same respect as capital punishment, are now quite commonplace—much as was the guillotine in revolutionary France. Insurers are beginning to throw up their hands and walk away from the mess.

I realize that these few statements will not, in and of themselves, convince you that we have a serious products liability problem. Indeed, convincing you on this score is not my primary function—I shall devote my energies mainly toward describing the sources of these difficulties and their best solution. But you will have ample opportunity to listen to other witnesses in these hearings, people who are experiencing first hand the wasteful and demoralizing effects of a liability system gone on the rampage. I am confident that after you have heard from them, you will conclude that my assessment of the situation is not inaccurate.

All right, assuming for present purposes that we do have a serious problem, what are its major sources? To clarify the situation, I shall briefly describe three significant periods in the development of our products liability law: the formative period, running from the late 1800s to the early 1960s; the period of consolidation, running from the early 1960s to the early 1970s; and the period of mounting chaos, running from the early 1970s to the present. During the formative period, the main focus of attention was on liability for manufacturing defects—that is, liability for individual products that were defective in the classic sense that they failed to meet the specifications set by the manufacturer himself. A new automobile sold in 1914 with a spoked wheel made of weak and rotten wood, causing the wheel to collapse and the vehicle to crash, was the sort of manufacturing defect with which the courts grappled in the formative period. From a conceptual perspective it was easy enough to see what was wrong with the products in these cases; the real question was who ought to be liable for the harm caused by the defects. If the plaintiff could prove negligence on the part of the manufacturer, he could recover, but negligence was hard to prove. The plaintiff could go against the retailer on implied warranty; but lack of privity and disclaimers effectively shielded the manufacturer from implied warranty liability.

It is a fair summary of the case law to say that in the period from the turn of the century to the early 1960s, courts gradually modified traditional rules of negligence and warranty to forge a new legal basis for liability: strict, privity-free, manufacturers' liability in tort. The formative period ended with the approval by the American Law Institute in 1964 of Section 402A of the Restatement of Torts, Second. In its essence, the now-famous Section 402A imposes strict liability on anyone who commercially sells a product that at the time of sale is not in defective condition, unreasonably dangerous to the user or consumer. Fault need not be proved; and manufacturers are responsible even to remote victims with whom they have not dealt directly. However dramatic the social policy revolution it reflected, in the manufacturing defect cases for which Section 402A was primarily intended, it worked well as a rule of decision. Conceptually it was not difficult to distinguish defective from nondefective products. And the rest of the elements of the plaintiff's case—"commercial sale," "proximate causation," and the like—posed few conceptual difficulties.

The period of consolidation that commenced with the approval of Section 402A and lasted into the early 1970s was typical of most periods following major social revolutions. Many implications of the new strict liability rule had to be worked out and resolved. Should commercial product lessors be treated the same as commercial product seller? Should nonuser, nonconsumer-bystanders be entitled to recover? Over the decade following adoption of 402A, answers to these and other questions were gradually worked out by courts in this country. Looking back on it, this period of consolidation was a productive—one might almost say a happy—time of post-revolution peace, in which a sensible and consistent body of doctrine was developed to deal with manufacturing defect cases. Manufacturers were not overwhelmed by their added responsibilities; exposures to liability were predictable enough for insurers to handle; plaintiffs injured by manufacturing defects were treated fairly on the whole.; and the social objective of creating meaningful incentives for improving product safety seemed clearly to have been enhanced.

And then, beginning in the early 1970s, darkness descended. What brought about this period I have described as the period of mounting chaos? Well, lurking in the background from the very beginning had been two other ways, besides manufacturing defects, in which products can present socially unacceptable risks of injury: product designs can be unreasonably risky, and products can be marketed without adequate warnings regarding hidden risks. There are several important differences between these design and warning deficiencies, on the one hand, and manufacturing defects, on the other. Only a few automobile wheels out of the many thousands sold will be weak and rotten. But if the design of the wheel is judged to be bad, then every single one of the automobiles sold with that same wheel design is potentially defective and could subject the manufacturer to liability. Moreover, it is not nearly so easy for courts to determine that a product is inadequately designed as it is to determine that a product contains a manufacturing defect. It will be recalled that in manufacturing defect cases, the product design provides a built-in standard against which to measure the individual product unit. According to the manufacturer's own specifications, the wheel spokes should have been made of solid oak; in this isolated instance, they wound up being made of rotten oak; the wheel is clearly defective.

But in design cases, the products do meet the manufacturer's specifications. The wheel that should be made of solid oak is made of solid oak. What the plaintiff attacks in a design case is the defendant's conscious choice to use solid oak. Assuming that oak wheels are fine for everyday driving, the typical design case would involve a plaintiff driving the automobile at high speed over a log in the road. The solid oak wheel breaks under the unusual stress and an accident results. The plaintiff claims that instead of oak, the wheels should have been made of steel. The manufacturer argues that steel wheels cost more and would require re-design of the axles, adding further costs—and weight—to the vehicle. "Why should the majority of consumers who do not drive over logs in the road be required to pay more for steel wheels, when oak is perfectly satisfactory for them?" asks the manufacturer. "Because logs are foreseeable and requiring steel wheels is, all things considered, in the interests of the greater social good," replies the plaintiff.

Sketching this hypothetical wheel design case reveals the unavoidable difficulties lurking in these design cases. No built-in standard exists for answering the question "How strong should a wheel be designed to be?" In the end, the plaintiff's idea of "social good" is too vague to provide the necessary guidance for rational decision, and so a jury given such a case is free to react emotionally, or on whim. Indeed, once the jury decides that "the wheel should be steel," the deliberateness of the manufacturer's otherwise good faith choice of oak invites them to consider awarding the plaintiff punitive damages.

Accepting for the moment that design and warning cases threaten the courts with intractibility when approached under vague principles of "social good," why had they not created problems long before the early 70s? For one thing, the working out of the rules governing manufacturing defect cases undoubtedly destracted attention away from them. For another, courts had earlier circumscribed the liability of manufacturers for negligent design with a cluster of common sense rules that limited their exposure—for example, the rule that design-related risks that are obvious are deemed to be assumed by users and consumers.

Why, then, in the early 1970s, did significant numbers of courts begin to address these design cases with increasing regularity and with increasingly chaotic consequences? Mainly I think it was the inevitable outcome of adoption of Section 402A with its broad promise of a "brave new world." Although primarily aimed at manufacturing defect cases, 402A on its face appeared to promise to apply to design cases as well; and after a brief period of mopping up and consolidating their victory over the old limitations on manufacturing defect liability, the plaintiff's bar took 402A's promise of new conquests and ran with it. Not only did they succeed in beating down the old limitations on negligence-based design liability, they also succeeded in persuading a number of courts that manufacturers should be held strictly liable, without fault, for the harm caused by their product designs. Of course, as I have explained, the standard for judging whether a design is defective must be essentially a negligence standard of reasonableness; but a number of courts insist, nonetheless, that manufacturers are strictly liable.

I published an article in the Columbia Law Review ten years ago, at the beginning of this period of mounting chaos, in which I made two basic points: first, that the basic standard for judging design cases must be the fault standard; and second, that courts are not able to cope with design cases under the vague standard of "reasonableness under the circumstances." The last several sentences of that article read as follows:

"If the coming years should find most courts attempting to adjudicate the reasonableness of manufacturers' conscious design choices, then we will have entered a regrettable phase in the development of products liability. The courts will have been badgered into trying to deliver more than the process of adjudication is capable of delivering, and the end result will be subversion of that process and its displacement by a thinly disguised lottery. If this occurs, it will be incumbent upon the legislature to replace the common law system of manufacturers' liability for conscious design choices with some more orderly, fair and rational system for compensating the victims of product-related injuries. 73 Colum. L. Rev. at 1578."

We have without question entered the "regrettable phase" to which I referred ten years ago. Many courts are introducing conceptual confusion by adopting a welter of differing tests for design and warning liability. And even in those jurisdictions that have adopted a basic fault standard in these cases, the courts are unable to reach consistent results without more specific guidelines than "reasonableness under the circumstances." What has emerged is a multibillion dollar-a-year social insurance scheme providing little or no guidance to manufacturers regarding how they should be designing their products to avoid liability. Now, there is nothing wrong, per se, with social insurance schemes. But on any view, this one is a monstrous rip-off of consumers. Out of every dollar paid by consumers to cover the relevant liability costs, less than fifty cents—estimates vary downward from forty-five cents to thirty cents—are returned to the consumers in benefits. Most of the rest—between fifty-five and seventy cents out of every premium dollar—goes to pay the lawyers, adjusters, and the like. If I were a cynic, I would say that if this is a social insurance scheme, it is being run primarily to benefit the trial bar.

All right, assuming that we have a serious problem, and that it flows mainly from the inability of courts to handle design and warning cases, what changes in the law are necessary? Two basic changes must be achieved legislatively: first, it must be clearly established that fault is the underlying principle upon which liability rests in design and warning cases; and second, courts must receive adequate guidelines for reaching fair and consistent results. In this latter connection it should be pointed out that most of the other problematic areas requiring attention—such as product misuse, product alteration and punitive damages—most often arise in the design and warning context.

Assuming that legislative intervention is required to return balance and integrity to this troubled area of tort law, why should the Congress act? Certainly there is no formal impediment, constitutional or otherwise, to prevent federal action. It seems to me that an intelligent approach to this question would be to assess the likelihood that the states will act. If meaningful state action appears unlikely, and a problem requiring legislative correction is recognized to exist, then the Congress should act.

Can the state legislatures be expected to provide for meaningful changes of the sort required? What is required is not only responsive legislative action, but also uniform action. More than half the states have passed some sort of products liability in recent years, and the results have exacerbated, rather than mitigated the disparity among the states. The Model Uniform Product Liability Act has been available to the states for several years, and has yet to achieve passage in a single state. Based on these experiences, I put the odds of meaningful state action somewhere between "very slim" and "none." The simple truth is that if the Congress does not do what is necessary to bring reason and balance to our law of products liability, no one will.

Thank you again for inviting me to come here today to testify. I shall be glad to answer any questions you may have.

Senator KASTEN. Thank you, Professor Henderson. Professor Phillips, you testified that you think most products-liability decisions of the courts are sound and reasonable, can you think of any decisions in the last 10 years that you do not consider sound and reasonable?

Mr. PHILLIPS. Some of the decisions I would personally disagree with, yes, but the vast majority of the decisions, I think, reach fair results.

Senator KASTEN. In your belief, the vast majority of the decisions are what?

Mr. PHILLIPS. Reach a fair result.

Senator KASTEN. Would the two of you want to make a comment on that Statement? Mr. Schwartz.

Mr. SCHWARTZ. Well, on almost every product-liability issue you are going to find a mixed house. Some courts say you have to warn about obvious hazards. Some courts say you don't. The ones that say you don't also say that one reason for this is that if you warn about something obvious it will diminish the impact of warnings about things that are really important.

Put yourself in the position of somebody who is trying to make a product. Does he warn about an obvious hazard or not? And you can go through each issue and find these diverse results.

Professor Phillips observed that your staff draft is anticonsumer. I would note just in passing that the staff draft adopts the minority rule on comparative responsibility and imposes pure comparative responsibility rather than modified, which is much more favorable for the consumer.

The staff draft also uses the discovery rule for a statute of limitations, which would dramatically change the rules of law in New York and permit a person who may have suffered a latent injury and now has no right to recover, a recovery. Professor Phillips also suggested that if you enact a product-liability law, the next step would be a Federal law on the premises liability. Insurers rate premises liability on State data, not nationwide data, and I doubt if Congress is going to be enacting a law on premises liability now or in the future.

Senator KASTEN. Mr. Henderson, you responded in part to Professor Phillips' statement that the decisions by and large are reasonable. Do you have any additional comments at this point?

Mr. HENDERSON. Well, I would make two points. First, the one I made in my statement, that even in those States that have adopted what I think in the end must be the standard of fault reflected in the staff draft are using an instrument that just is not capable of addressing the issues in these hard design cases. Add to that the fact that in a number of jurisdictions—and I have written to this in law review articles—are going beyond the fault standard attempting to impose "strict liability" for design defects and you have got an awful mess.

I think it really comes down to the courts being unable, as courts, as deciders of concrete cases, rather than as lawgivers essentially, to draw the necessary lines. It is a slippery slope. There is no place short of handing over to triers of fact, in admittedly emotional circumstances, issues that they can't deal with. So I see a very different picture than he.

Senator KASTEN. Professor Phillips, if you think the decisions in this field are reasonably sound, how can you explain this wide divergence from State to State, for example, or the multitudinous bases for bringing products liability actions?

Mr. PHILLIPS. The various theories that have grown up for bringing products liability actions result, I think, from the fact that there has been a convergence here of the law of contracts and the law of torts, giving the plaintiff numerous theories upon which to sue. However, the overlap is not nearly so extensive as it would appear. The various theories each have a justification in their bases. Traditionally the plaintiff has been able to sue on as many theories as he can make out a cause of action in other areas of the law. This is not unique to the law of products liability by any means.

Senator KASTEN. In other words, it doesn't concern you that there is very little predictability and that you could take a certain set of circumstances in one case in one State and take the same set of circumstances in another State and have completely different results? In other words, the lack of uniformity, in terms of commerce, is not that important to you?

Mr. PHILLIPS. The standard of reasonableness, it strikes me, is a reasonable standard, if I may say so. Products-liability actions are not inexpensive suits to bring. A lawyer will not bring what appears to him to be a spurious suit because it becomes too expensive for him to undertake such litigation. And ultimately the jury is going to make the decision—12 men and women—as to whether or not a case has been made out.

If they find on the facts of the case that it has been, then it seems to me there should be recovery. I think you can get differing results in different States because of different qualities of the lawsuits tried. That is true in all areas of the law, not just products liability.

Senator KASTEN. Do you feel that a system which essentially produces 7 cents in legal expenses for 6 cents in recoveries is in the interest of the consumers?

Mr. PHILLIPS. I am not familiar with the source of those figures.

Senator KASTEN. If that were the case, would that be in the interest of the consumer?

Mr. PHILLIPS. That is expensive. There is no doubt about it.

Senator KASTEN. It would not be in the interest of the consumer?

Mr. PHILLIPS. It would not be.

Senator KASTEN. If we had more uniformity, don't you think that we would be able to at least reduce some of those legal costs?

Mr. PHILLIPS. I doubt it. I doubt it seriously. I don't think the legal costs have been reduced in the State of Tennessee by the passage of its statute. Indeed, our statute has created enough lawsuits for lawyers to last for the next two decades or more.

And, moreover, I think it is undesirable in this area to freeze the law in a State of rigidity. Tort law has traditionally and historically been a field that has developed by common law method. No matter how carefully legislation of this sort is drafted, it cannot anticipate all of the problems and all of the large problems that will lie down the road in this field. And in that respect, where the problems have not been anticipated, it seems to me the legislation acts simply as a stumbling block.

Senator KASTEN. I want to try to establish a point. You said that you disagree with the need to reform product liability law at the Federal level. Is it also true that you are against product liability law in Tennessee, or do you feel that having 50 State laws—different State laws—is a correct solution?

Mr. PHILLIPS. No. I am against the State laws as well.

Senator KASTEN. Then you are against the whole idea of product liability law, at either the Federal or State level?

Mr. PHILLIPS. I am against statutory regulation in this field.

Senator KASTEN. On the Budget Committee where I wear a different hat, I am always having to choose between the four or five worst cases. Wouldn't it be more sensible to enact a Federal law and at least get rid of the divergence between the various States if we are going to come up with some kind of a products liability system in the end?

Mr. PHILLIPS. Well, my point in that regard, Senator, was that the major States have not enacted legislation. They have considered and rejected the idea that there should be such legislation in this field. It is the rather underpopulated States that have not really realized the effect of the statutes thus far.

Senator KASTEN. I would like to ask Mr. Schwartz and Mr. Henderson to respond to that.

Mr. SCHWARTZ. Professor Phillips also stated that no product liability legislation has been enacted in any major State. There are statutory product liability laws both in the States of Illinois and Michigan. While I don't see members of those States in this subcommittee here this morning, I think they might agree that they are major, populous States.

In other States, such as Pennsylvania, there have been very difficult "product liability legislative wars" that have gone on for years, but a fundamental argument is made against those laws by the plaintiffs' lawyers, who oppose them. And that argument is—and I have heard it again and again, that a major State such as Pennsylvania can do nothing to solve the product liability problem. Goods are shipped outside of Pennsylvania. The plaintiffs' lawyers contend that the only thing the statute will do will be to limit rights of citizens in Pennsylvania without providing any benefits to product sellers. And sometimes those arguments have been successful. But it behooves people, then, and Professor Phillips has not been involved in this, to then come to your subcommittee and say well, we shouldn't have any Federal law either.

The very argument that has been used to defeat State laws is the fact that product liability is totally emeshed in interstate commerce.

Senator **Kasten**. Professor Henderson.

Mr. **Henderson**. I would say that any effort to introduce a comprehensive product liability reform measure, if you like, in a major State meets immediately the argument that even if it succeeds, what does it prove. The States to some extent are in competition with one another and to ask of a few of the major States to take the lead in this fashion where it really is a rather hopeless, futile gesture is asking more than we can ask of the State legislatures.

Certainly the Uniform Product Liability Act has been out there for several years. Hopes were high at the very outset that something might come of it. It is now clear to me, as certainly as anything is clear to me, that nothing ever will. If anything is to be done in this area, the Congress is going to have to do it.

Senator **Kasten**. I would like to thank the three of you for your testimony and for your participation in our hearings here this morning. We very much appreciate your appearing and look forward to working with all of you as we work through the second draft, hopefully toward some kind of legislation which will achieve the purposes and frankly the balance that we are seeking to achieve.

I thank you all.

Mr. **Schwartz**. Thank you.

Mr. **Henderson**. Thank you.

Mr. **Phillips**. Thank you, Senator.

Senator **Kasten**. The next panel would include Mr. Taft, Ms. Trubek, Mr. Butler, and Ms. Pequet, if all four of you could come forward.

The first statement this morning will be made by the Honorable Robert Taft, general counsel for the Special Committee for Workplace Product Liability Reform. And I might add, although I was not here at the time he was, a former colleague.

Bob, we look foward to your testimony.

STATEMENTS OF HON. ROBERT TAFT, GENERAL COUNSEL, SPECIAL COMMITTEE FOR WORKPLACE PRODUCT LIABILITY REFORM, ACCOMPANIED BY ARTHUR ROSEN; LOUISE G. TRUBEK, EXECUTIVE DIRECTOR, CENTER FOR PUBLIC REPRESENTATION; ROBERT A. BUTLER, NATIONAL ASSOCIATION OF MANUFACTURERS, ACCOMPANIED BY WILLIAM RUMBLE; AND BARBARA K. PEQUET, LEGISLATIVE DIRECTOR, NATIONAL CONSUMERS LEAGUE

Mr. TAFT. Thank you very much, Mr. Chairman. We do appreciate the privilege of appearing here this morning.

I am Robert Taft, Jr., general counsel for the Special Committee for Workplace Product Liability Reform. It is a nonprofit corporation organized by a group of 14 trade associations over 5 years ago which has been working in this field, and particularly working with regard to the wide spectrum of capital equipment manufacturers that we have had in our association. We are also a part of the Product Liability Alliance and find ourselves very much in agreement with the remarks made by Mr. Schwartz earlier.

I have with me today Mr. Arthur Rosen, president of McKeon Machinery Sales, Inc., and a member of our association. The McKeon company is located in Olean, N.Y.

We particularly want to put emphasis on the workplace aspects of the problem. Our members are all of them manufacturers or sellers of equipment that is put into the workplace, and this is a very important part of the product liability problem that needs special attention.

Before proceeding I would like to commend the chairman and committee members on the work that was done on the Risk Retention Act as well as the tremendous amount of work that has already gone into this effort. Also, I think it would be appropriate to comment on and commend the Department of Commerce of the United States in three administrations who have participated in the background work that has brought this legislation to the point at which we find it today.

I am not going to repeat the many legal arguments that have been made already, I think very ably, by proponents of the legislation. I would just note that from the point of view of the workplace manufacturer that it is important that we try to resolve some of the uncertainty that we see currently in the law. We do believe that this can only be done by meeting the need at the Federal level. We believe that insurance rates are set nationally and that this is a very important part of that consideration.

We believe that there is a cost factor for small businesses, which is mostly what our people are, that means that they cannot afford the legal and engineering time that is necessary to analyze their responsibility in all 50 States. We think that there is a chill on product development—that has been mentioned already—that we see in our particular industries and is particularly severe with regard to competitive imports.

We see the problem as growing, not going away. I would like to point out, for instance, that the number of product liability cases filed in Federal courts across the country has more than doubled in the last 3 years.

I would also like to say that even though there are 30 States that have now enacted some form of product liability statutes over the last 6 years, there has been really no relief in the direction of getting any uniformity in the law. In fact, the new bills may even be adding to the complexity and the differences.

The Uniform Product Liability Act, while it was a good effort, simply does not seem to have much chance of working.

And finally, I want to talk just for a moment about the fact that I think that the safety factors, particularly with regard to the workplace products, are most important ones for this committee to concern itself with.

I think the primary national benefit that can result from a national product liability law of this type is in the safety field. Now, it is said that there is not any Federal precedent for moving in this way. This simply is not true.

I have listed in our testimony in some detail the various acts that have been passed dealing with problems of this sort. Let me just list them for you: the Federal Employees' Liability Act in 1908, the Longshoremen's and Harbor Workers' Compensation Act in 1927, the Black Lung Act on which I worked when I was in Congress, the Crime Control and Safe Streets Act of 1968, the Consumer Product Safety Act, the Price-Anderson Act, the no-fault compensation system for catastrophic nuclear accidents, the swine flu immunization program—just to mention a few. And there are many other areas where local problems have become so national in their scope, particularly when they are dealing with the employment relationship, that it has been necessary to move some degree of Federal regulation.

At this point to emphasize the need for the legislation as it impacts particular businesses I have with me Art Rosen, who has a statement.

Mr. **Rosen**. Our organization's concern focuses particularly on the unique product liability problem in the workplace. We believe that the product liability problem as it relates to workplace injuries is interwoven tightly with the inequities and injustices inherent in our current system for compensating victims of workplace injuries.

Under present law all State workers' compensation statutes bar recovery or indemnification from the employer by a workplace product manufacturer no matter how negligent the employer may have been in failing properly to guard and maintain that product or in failing to instruct and monitor his employees on how to use it.

This inequity is further compounded by the fact that in many jurisdictions the employer and/or his workers' compensation insurance carrier obtains a subrogation lien for third party recoveries even though the employer may have caused or contributed to the cause of the employee's injury.

The insurance service office study reveals about 58 percent of the workplace product liability bodily injury payments involve cases where the employer may have been negligent. Thus, manufacturers of workplace products are in fact paying the entire cost of many industrial accidents while employer users of the product are completely relieved of financial responsibility, despite the fact that they may have been in a better position or in the only position to prevent the action from occurring. For example, it is the employer who has control over the equipment, its maintenance and its use; it is he, the employer, who makes decisions in determining whether potential injuries outweigh the cost of preventitive measures. Insulating employers and employees from the effect of their own negligence results in the disincentive for workplace safety.

The present system is extremely unfair and wasteful, and the wrong party is paying the bill for this wasteful system. In a 1976 survey of the National Machine Tool & Builders Association it was found that only in 13 percent of the workplace product-related accidents could a case be made that the accident resulted from some sort of mechanical failure of the machine itself. Sixty-three percent of the time the accident occurred because the employer failed to properly guard the machine. Thirteen percent of the accidents occurred because he failed to make sure that his employees used the appropriate safety device. Sixty-five percent of the injured employees did not receive appropriate training from employers in how properly and safely to operate the machine. The survey also showed that 56 percent of the injured employees had been on the job for less than 6 months prior to the accident.

These statistics reveal the variety of causes of workplace injuries which are beyond the product manufacturers' control, and yet because of the failure to integrate the legal principles and social bases of strict liability in workmen's compensation, the manufacturers of workplace products are paying for these injuries while the employee and employer are relieved of any responsibilities.

The impact of this burden on insurance premiums, rightly or wrongly, has been overwhelming. The insurance service office closed claims survey of 1977 found that although 11 percent of the claims of workers injured on the job were product related, these claims result in 42 percent of the total amount of payments.

I have been in the used machine tool business for 26 years. My company grosses over $4 million a year, primarily in the sale of used metal-working machinery tools. We employ 25 people. We have sold over 4,000 large and small machine tools to primarily small manufacturers over this period.

Product liability is a noose over my head. My company presently has four liability suits pending. The largest is for $21 million. I am presently insured, but what does that do? Our limit is $500,000. The $21 million claim is for the death of a person caused by his breaking his company rules. He was running a small lathe which we sold in 1972 for $2,750. This machine was built in 1944 and has run adequately for almost 40 years. The person was wearing loose clothing which caught in the machine while he apparently was climbing over the machine and kicked or pushed in the clutch.

This lathe is a current state-of-the-art machine. This accident could happen on a brand-new machine. As I also understand the accident, he was operating the machine during a break in time against company rules. If we lose and the judgment is rendered over $1 million or even less, that is the end of my company, 26 years of work, the jobs of 25 people.

The present laws place my company and possibly myself personally constantly under a very dark cloud. Is this fair? Our whole industry, which the American economy depends on, needs this bill.

I will be responsible for my actions, but how can I be responsible for the acts of my customer and his employees? How can I be held responsible for a machine tool I did not build that has functioned perfectly for the past 10 to 40 years and that I have not seen for maybe 5 to 20 years?

Thank you.

[The statement follows:]

STATEMENT OF ROBERT TAFT, JR., AND ARTHUR ROSEN ON BEHALF OF SPECIAL COMMITTEE FOR WORKPLACE PRODUCT LIABILITY REFORM

I am Robert Taft, Jr., General Counsel for the Special Committee for Workplace Product Liability Reform. This is a nonprofit corporation organized by a group of 14 trade associations and other concerned parties for the purpose of seeking a remedy to the product liability crisis in the workplace. Those represented by SCWPLR include a wide spectrum of capital equipment machinery manufacturers, distributors, and marketers including approximately 7,000 companies with a total annual sales volume in excess of 30 billion dollars, employing approximately 2 million employees, and operating in all 50 states.

Also testifying with me on behalf of SCWPLR is Arthur Rosen, President of McKean Machinery Sales, Inc. of Olean, New York.

We believe that the facts which have been developed by the Interagency Task Force on Product Liability, the Congressional hearings on product liability, and the studies and surveys conducted by other organizations (including our own members) clearly establish that the product liability problem in the workplace has reached proportions threatening to the industries of America. We agree with Senator Kasten's statement that "product liability legislation is needed to bring uniformity and certainty to the law and to stabilize what has become a serious burden on interstate commerce."

We command the Committee members and your staff for preparing a comprehensive and precise product liability law. We believe that the staff draft will simplify, clarify, and bring uniformity to the present tort law of product liability. It should also help to overcome some of the injustices and inequities which have resulted from the extreme positions taken by the courts of some states. By specifying criteria for determining responsibility and limitations on responsibility, the staff draft should reduce uncertainty and ambiguity in the product liability field.

Our organization's concern focuses particularly on the unique product liability problem of the workplace. We believe that the product liability problem as it relates to workplace injuries is interwoven tightly with the inequities and injustices inherent in our current system for compensating victims of workplace injuries. Under present law, almost all state workers' compensation statutes (and/or their court interpretation) bar recovery or indemnification from the employer by a workplace product manufacturer, no matter how negligent the employer may have been in failing properly to guard and maintain that product or in failing to instruct and monitor his employees on how to use it. This inequity is further compounded by the fact that, in many jurisdictions, the employer and/or his workers' compensation insurance carrier obtains a subrogation lien from third party recoveries even though the employer may have caused or contributed to the cause of the employee's injury. The Insurance Services Office (I.S.O.) study reveals that about 58 percent of workplace product liability bodily injury payments involve cases where the employer may have been negligent. Thus, manufacturers of workplace products are, in effect, paying the entire cost of many industrial accidents, while employer-users of the products are completely relieved of financial responsibility despite the fact that they may have been in a better position (or in the only position) to prevent the accident from occurring. For example, it is the employer who has control over the equipment, its maintenance, and its use, and it is the employer who makes decisions determining whether potential injuries outweigh the cost of preventive measures. Insulating employers and employees from the effects of their own negligence results in a disincentive for workplace safety. The present system is extremely unfair and wasteful, and the wrong party is paying the bill for this wasteful system.

In a 1976 survey of the National Machine Tool Builders Association, it was found that in only 13 percent of the workplace product related accidents could a case be made that the accident resulted from some sort of mechanical failure of the machine itself. Many of the machines have been modified one or more times by the employer and/or the person or persons from whom he bought the machine. The study shows that 18 percent of these machines were poorly maintained by the employer. Sixty-three percent of the time the accident occurred because the employer failed to properly guard the machine. Thirteen percent of the accidents occurred because he failed to make sure that his employees used the appropriate safety device. Sixty-five percent of the injured employees did not receive appropriate training from their employers on how properly and safely to operate the machine. The survey also showed that 56 percent of the injured employees had been on the job for less than six months prior to the accident. These statistics reveal the variety of causes of workplace injuries, which are beyond the product manufacturer's control and yet, because of the failure to integrate the legal principles and social basis of strict liability and workers' compensation, the manufacturers of workplace products are paying for these injuries while the employee and employer are relieved of any responsibility. The House Subcommittee on Capital, Investment, and Business Opportunities concluded that: "It is inequitable for manufacturers to shoulder the entire burden for workplace injuries when the employer's negligence contributed to the same." H.R. Rep. No. 997, 95th Cong. 2d Sess. 74 (1978).

The impact of this burden on insurance premiums, rightly or wrongly, has been overwhelming. The Insurance Services Office Closed Claim Survey of 1977 found that, although only 11 percent of the claims of workers injured on the job are product related, these claims result in 42 percent of the total amount of payments made on all product liability claims (including both workplace and nonworkplace). In an analysis conducted by the American Mutual Insurance Alliance of 79 large-loss claims, it was found that nearly three-fourths of the awards (70 percent involved industrial products, and 60 percent of the 104 injured persons sustained bodily injuries while at work. The Industry Study conducted for the Interagency Task Force on Product Liability points out that "firms of small and medium size are more likely to have claims experience if they are engaged in manufacturing workplace machinery or equipment rather than consumer goods or 'anonymous' products." Product liability insurance premiums have undergone dramatic increases over past years and may be expected to rise again in the future. Those companies who have deductibles have been required to retain an ever increasing portion of their liability. This situation has resulted in enormous increases in insurance premiums for manufacturers of workplace products.

The high costs involved in having key personnel assist in the defense of a case also be considered. We cannot understate the cost to industry of executive and engineering time spent in responding to voluminous discovery requests and in defending product liability suits.

The cost of resolving product liability disputes cannot be overlooked. These high transaction costs are caused largely by the lengthy litigation involving applicable rules of liability, rules that are subject to a great deal of uncertainty. The American Insurance Association has cited estimates that for every 66 cents an injured claimant receives, 77 cents is spent in legal costs. The quantity of product liability lawsuits has led many product liability insurers in the late 1970's to either leave the field or to charge high premiums unrelated to the insured's individual claims experience. These high transaction costs cannot be justified as part of any meaningful compensation system.

Unfortunately, in dealing with this crisis, the manufacturers may not in fact even have the option of selling out and ceasing to operate in the field rather than risking bankruptcy, since unfunded contingent liability on claims not yet filed makes it difficult if not impossible to sell small companies in the machinery manufacturing and distribution field, even through a sale of assets. In *James Allen Trimper* v. *Bruno-Sherman Corp.*, 437 F. Supp. 349 (E.D. Mich. 1977), for example, the court found that liability can attach to a successor to certain assists of the original third party manufacturer of a machine which was involved in an injury, even though there has been two intervening sales of assets of the original company. Fear of being "infected" with potential future claims through any interrelationship, no matter how attenuated, leaves the manufacturer who cannot afford insurance unable even to sell his company or its assets.

The harmful effect of these economic realities upon the capital equipment industry in the United States is hard to estimate exactly; but it clearly has had a major impact on increased prices with an attendant ripple effect on sales, inflation, and ability to compete with foreign sources. The costs are ultimately passed on to U.S. consumers in the form of higher prices for products. Some companies discontinue manufacturing those items that account for most product liability suits and thereby remove highly vulnerable, but possibly vital, industrial products. The Interagency Task Force on Product Liability in its 1978 study also found that some firms are already reluctant to develop and introduce new products because of product liability risk. This trend could exacerbate the already serious problem of the United States losing its competitive edge in technology.

Product sellers, insurers, and risk retention groups need a uniform, unambiguous, and fair product liability law so that they will have a firm basis upon which to project their responsibility and liability exposure. Currently, the "rules vary from jurisdiction to jurisdiction and are subject to rapid and substantial change. These facts militate against predictability of litigation outcome." 44 Fed. Reg. 62716 (1979). The proposed "Product Liability Act of 1982" addresses this problem where it must be dealt with: at the Federal level. At the same time, however, it calls for no expenditures of Federal revenues, no new Federal bureaucracy, and no expansion of the Federal courts.

There is no single system or common body of laws which exist in the United States concerning product liability. Each state has its own common law on product liability. In recent years this common law has been subject to frequent and substantial revision. Because of the rapid change in product liability law in each state, and because the common law rules on product liability vary from state to state, it is virtually impossible for a manufacturer of products sold throughout this country to determine the current status of "the law" when it is attempting to determine its legal duties. Insurance companies claim that they cannot predict their exposure and that, to avoid disaster, they are forced to assume the worst and charge accordingly. Manufacturers are outraged at increases in deductibles and high premiums which do not reflect actual product risks or liability losses.

There are those who say that current efforts to achieve product liability reform at the state level will resolve this problem. However, that solution ignores the fact that product liability insurance rates are not set on a state-by-state basis, but rather are established on the basis of a nationwide experience. Since the sale of products is not limited to the state in which they are manufactured, and tort law varies from state to state, it is not surprising that the insurance companies set their rates on their nationwide loss projections. Furthermore, there is no indication that tort reform laws that are passed on a state-by-state basis will be sufficiently similar ever to form the basis for the predictability and certainty which are a prerequisite to lowering of insurance rates.

We also recognize that the thousands of small businesses represented by our organization cannot afford the legal and engineering time and cost which would be necessary to analyze the responsibility of a manufacturer under the product libability laws of all 50 states. This has had a chilling effect on product development and innovation. Furthermore, the uncertainlty in the law requires extensive and costly litigation in the pursuit of further definition and determination of what legal principles are applicable in a given case. A court must not only decide which state's law will govern the case but it must also then delve into the morass of conflicting decisions concerning the subject. Of course, this is exacerbated by the increasing volume of product liability litigation. Indeed, the number of product liability cases filed in Federal courts around the country has "more than doubled in the last three years." Business Insurance, October 12, 1981.

It is important to note that the tort reform laws which have been passed at the state level are not consistent but differ in substantial degree. In fact, recently enacted state product liability laws have created new variances in our nation's tort laws, resulting in more confusion and uncertainty. Over thirty states have enacted some form of product liability statute in the past six years. Of the states which have passed such legislation, some have passed a statute of repose, cutting off liability on products after a given life span, and others have not. Some of these provide for an absolute cutoff of liability after a number of years (varying from 6 to 12), and others provide for a presumption of no responsibility after a given number of years or something less. While some provide that modification or misuse of a product is a defense, others do not. Some of these statutes are very limited in scope; others are more comprehensive. The language used for similar provisions differs, thereby opening the door for varying judicial interpretation. While we applaud the efforts to achieve tort reform at the state level, we have no confidence that the same bill will be passed in each state with the same provisions or the same language. The current experience with state tort legislation suggests variations will occur even in passage of a model product liability act, followed by further variation in judicial interpretation. Finally, we believe the inequity and imbalance in the current product liability system must be corrected with a minumum of delay. The adverse impact on medium and small business and ultimately upon consumers and the economy in general cannot be allowed to continue much longer. It took 15 years to pass the Uniform Commercial Code at the state level, and it still has variations from state to state. The nation cannot afford to wait 15 years for widespread passage of a model product liability act.

It is argued that we should not have tort reform at the Federal level because tort law has historically been the province of the states. We believe recent legislative history indicates that this is not true. There are a number of Federal statutes which were enacted to provide benefits or settle claims where state law was deemed inadequate to compensate for workplace injuries. Perhaps the first Federal legislative effort in this area was the "Federal Employees' Liability Act" which was passed in 1908 in order to apply a Federal tort law to determine the damages incurred by any railroad employee injured or killed in the course of employment. This was followed in 1927 by passage of the "Longshoremen's and Harbor Workers' Compensation Act" which provided workers' compensation as well as a Federal tort law to deal with claims against ship owners. More recently, laws have been enacted which, for example, provide compensation benefits for non-fedeal law enforcement officers (5 U.S.C. §§ 8191–8193) and compensation for black lung victims (30 U.S.C. §§ 901–936). Importantly, the tort law called for here, unlike the Longshore and Black Lung schemes, requires no Federal bureaucracy and no expenditure of Federal monies.

Since the late 1960's, there has been an increasing involvement of the Federal government in tort law related issues: "The Crime Control and Safe Streets Act" 18 U.S.C. § 2520 (1968) (civil action against any person who intercepts a telephone conversation); "Consumer Product Safety Act" 15 U.S.C. § 2072 (1972) (Federal tort remedy for persons who are injured as a result of a knowing violation of a safety standard or rule of the CPSC); "Price-Anderson Act" 42 U.S.C. § 2012 (1975) (no-fault compensation system for catastrophic accidents at nuclear power plants); "National Swine Flue Immunization Program" 42 U.S.C. § 247(b) (1977) (Federal responsibility for strict liability tort claims that arose out of that program). In addition, Federal regulation of airline transportation has changed the law of trespass and nuisance as it regards aircraft. Moreover, the comprehensive "Enviornmental Response, Compensation and Liability Act of 1980," which deals with the damages that arise from hazardous substances, impacts on traditional state tort law by establishing Federal strict standards of liability, joint and several liability, as well as apportionment of damages. Clearly, there is ample precedent for Federal legislative activity in tort law. The tradition of state control over tort law has long given way where there is a need for national solutions to national problems. The proposed legislation addresses what is certainly one of the most appropriate and sorely needed areas of Federal attention.

Because of the severely detrimental impact on interstate commerce of the current chaos among states regarding product liability, we believe that product liability reform should be enacted at the Federal level and not on a state-by-state basis. Since product liability insurance rates are set on the basis of a nationwide experience rather than individual state experience, variations on a state-by-state basis will impact adversely on the goal of achieving affordable and stable product liability insurance rates. Through a clear understanding of their product responsibilities as set forth in the Federal bill, manufacturers will no longer be reluctant to develop new and innovative products which will be distributed throughout the country. Litigation costs will be substantially reduced through elimination of the costly process of determining conflicts of law issues and defining which principles of law are applicable. We believe that the only way to alleviate these problems is to enact this tort reform legislation on a nationwide basis, thereby insuring uniformity and stability in the law of product liability and hastening the implementation of this much needed reform.

Understanding that the product liability problem in the workplace is a serious impediment to interstate commerce requiring Federal legislation, we believe that the staff draft is an appropriate response to that problem. The interaction of Section 7, Comparative Responsibility, Section 8, Misuse or Alteration, and Section 9, Effect of Worker Compensation Benefits, should bring balance to the workplace product liability compensation system. The responsibility of the careless employee and careless employer will be weighed in apportioning responsibility between the persons involved.

The comparative responsibility principles reflected in Section 7 of the draft bill still effectuate the policy underlying the adoption of product liability laws while providing for a more fair and equitable approach to the problem. Moreover, by holding manufacturers liable only for their own degree of fault, comparative principles will help alleviate the product liability insurance problems. The advantages of a comparative responsibility approach are reflected in the growing trend among the states to apply comparative fault principles in product liability actions as well as in scholarly commentaries which have increasingly urged the application of comparative responsibility.

Comparative responsibility principles in product liability actions further the interests of both injured plaintiffs and product sellers. The product seller's interests are advanced because he is not required to absorb liability to an extent greater than his culpability. At the same time, the interests of the product user are furtherd because he can recover partial damages if he has misused the product and if the product seller is also at fault.

The application of comparative responsibility principles to product liability actions will in no way undermine the policies which are advanced through a product liability system. The plaintiff's burden of proof will not be significantly altered by the imposition of a comparative responsibility approach in all products liability cases. Moreover, if comparative responsibility is adopted in product liability actions, the manufacturer will not be absolved of liability; the motivation to make a safer product will not disappear. It is true that the manufacturer's exposure to liability will be lessened to the extent that the plaintiff's conduct contributed to the injury, but it is also true that the manufacturer's exposure may be increased when a plaintiff who is normally barred from recovery under assumption of risk or contributory negligence is allowed some recovery as a consequence of any fault on the part of the defendant manufacturer. Without comparative responsibility, the requirement that the product seller pay all damages provides no incentive to regulate a product user's conduct. By allowing the injured claimant to recover part of his damages from the product seller, and thereby aligning liability with fault, the conduct regulating aspect of liability is maximized for both the product seller and the product user.

The application of comparative principles is especially important in the context of the workplace. Employer exclusivity provisions of workers' compensation statutes do not allow an employer to be impleaded in a product liability action. Nor is a third party able to seek contribution against the employer, because implicit in the decision of the state legislature to adopt a workers' compensation statute is the judgement that employers should not be liable for costs in excess of the established workers' compensation ceiling. A majority of jurisdictions will not even allow an employer to be named as a party to an action involving a work related workplace injury even though the negligence of the worker's employer contributed to that injury. The provisions of the draft bill which provide for comparative responsibility strike an equitable balance which preserved both the efficient allocation of liability and the statutory ceiling on an employer's liability under workers' compensation. It also ensures that an injured plaintiff is quickly and reasonably compensated for all injuries caused by defective products.

Paragraph (2) of Section 7(b) is the core of the comparative responsibility provision. Without this paragraph the current injustice will be perpetuated in the workplace product liability compensation system. Under the bill as written, where the claimant's employer or co-employee is at fault, damages shall be reduced by the amount of workers' compensation benefits paid and payable or by the percentage of responsibility apportioned to such employer or co-employee, if that amount is greater. We believe that this provision is fair to the employee in that he received workers' compensation benefits as payment for any injury which may have been caused by his employer or co-employee. In exchange for this no-fault payment of benefits the employee has given up his court action against the employer or co-employee. Having been compensated for the injury caused by his employer or co-employee by workers' compensation, he should not be able to recover again for that injury from a product seller who has no culpability in the accident. Recovery of damages from a product seller should be limited to that portion of fault attributable to the product seller's actions. The basic principles of the workers' compensation system are therefore integrated with product liability law through Paragraph 7(b)(2) of the draft bill.

Section 8 of the draft bill contains important provisions concerning misuse or alteration of products. After the product has left the manufacturer's plant, the manufacturer has no control over misuse, alteration, or modification of the product. Surveys have indicated that in excess of 58 percent of workplace injury payments have been made where the injury may have been caused by employer negligence and that 65 percent of the injured employees did not receive adequate training from their employers on how properly and safely to operate the machines. Furthermore, the statistics also show that over ⅓ of all workplace accidents occur during a worker's first six months on the job.

In a survey of the National Machine Tool Builders Association, it was found that in only 13 percent of the workplace product related accidents could a case be made for some sort of mechanical failure of the machine itself. Many of the machines had been modified one or more times by the employer and/or the person or persons he bought the machine from. The study shows that 18 percent of these machines were poorly maintained by the employer. Sixty-three percent of the time the accident occurred because the employer failed to properly guard the machine. Thirteen percent of the accidents occurred because he failed to make sure that his employees used the appropriate safety device. These statistics verify the need for Section 8 in the draft bill.

Section 9 helps to rectify the unfairness of the current system where the manufacturer of the workplace product pays the costs of a product related workplace injury and is unable to place any portion of the cost of the injury on an employer whose negligence may have helped bring about the claimant's injury. It focuses on one of the primary criteria utilized in this draft bill which is to place the incentive for loss prevention on the party or parties who are best able to accomplish that goal. The present system operates contrary to that principle and creates a disincentive for the employer to keep workplace products safe. Currently in many states a workers' compensation insurance carrier or employer may assert a lien against the claim of an injured party who recieved workers' compensation benefits and prevailed in a product liability lawsuit. The carrier and/or employer could thereby recover those paid benefits. This system encourages complacency by the workers' compensation carrier and the employer because it removes a monetary incentive for active involvement in safety procedures and injury prevention. Instead, the incentive focuses on an employer or an insurance carrier promoting a lawsuit by the injured party so that the carrier or employer could be reimbursed out of the plaintiff's recovery. Consequently, many lawsuits are instigated not by the injured party but by the employer or its workers' compensation insurance carrier advising the employee that he may get large (but generally ephemeral) recovery for pain and suffering not compensated by workers' compensation. We believe that this has contributed substantially to the large volume of product liability lawsuits. Section 9 should eliminate employer and insurance carrier subrogation to product liability lawsuits and thereby create a monetary incentive for them to emphasize safety and injury prevention in the workplace. Plaintiffs with good claims against third parties would not be barred by the section.

While Section 9 will overrule the current majority rule, recognized scholars in the field have long been calling for this change as being an equitable solution to the problems caused by the current law which will involve the least transaction costs. We are also beginning to see a similar tendency in the courts to seek a basis for holding the employer accountable for its negligence in causing workplace injuries.

We also applaud the efforts of the drafters in writing the provisions of Section 4. We support the objective criteria established for standards of responsibility for manufacturers. This has involved the difficult task of codifying the current law of liability for defective construction, defective design, inadequate instructions, and express warranty. While we might disagree with some of the criteria, on balance we think that the drafters did an excellent job; and we support the standards as being fair and reasonable. While design and duty to warn cases are placed on a fault basis, it is important to note that the factor of hindsight is eliminated by the trier of fact focusing on the manufacturer's ability at the time of manufacture to be aware of the product's danger and the practical technological feasibility at that time of eliminating the danger or warning against it.

Section 4(a)(1)(B) codifies the sensible rule that a claimant must prove that the defendant manufactured or sold the product. Otherwise, some manufacturers would be in a position of liability for the fault of other manufacturers of similar products merely because the claimant was not able to identify the manufacturer. The result could be drastically increased insurance risks for all manufacturers, an outcome the drafters were wise to guard against.

Section 10 of the draft bill, providing a time limitation on liability, represents a positive advance in the direction of fairness. However, we believe that the 25-year time limitation for claims brought for harm caused by capital goods is too lengthy and should be shortened to ten years. The volume and expense of maintaining detailed records for 25 years "just in case" a product liability suit is brought against a 25-year old machine is not a fair or practical requirement. Designs and technology drastically change, thereby rendering much of the information virtually useless.

Twenty-one states have already enacted statutes of repose for product liability suits. The periods of liability in these statutes vary from 6 to 12 years. The shortest statutes of repose currently enacted recognize the need to balance complete records and personnel availability against the cost of record storage and unavailable contributors to the design and production of the manufactured goods. They also acknowledge the responsibility of a product owner to properly maintain his equipment. Few machines can continually be operated for years without servicing. In addition, few mechanical or design defects will remain hidden beyond ten years. Since 83.5 percent of all bodily injury accidents occurring from capital goods happened within ten years of manufacture, very few cases would be affected by a ten-year statute of repose. (44 Fed. Reg. 62733 (1979).) Furthermore, most purchasers who use the product beyond the ten years are thoroughly familiar with the product, and if it has been properly serviced, no injuries should occur. If a product defect or a worker injury has not manifested itself within those ten years and subsequently the purchaser is injured while working with the product, the purchaser's disregard for his or her employee's personal safety is the likely proximate cause of the injury.

A ten-year statute of repose will reduce transaction costs as well as lawsuits, since most claims on over-age equipment result in judgments in favor of the defendant. While the number of actual judgments in favor of plaintiffs are de minimus, the number of claims filed are substantial. The ten-year statute of repose would eliminate this needless and fruitless litigation.

In conclusion, we believe that the draft product liability legislation is a highly professional, well thought out, and articulate approach to a very complex problem. It provides valuable guidance to the courts which are presently facing a changing and often conflicting array of case law and statutes constituting "product liability law" in the various states today. Both product sellers and consumers should benefit substantially from the passage of this measure at the Federal level. We would be glad to offer our assistance in gathering additional data or in the legal/technical aspects of the proposal. It is important that Federal product liability legislation be enacted as soon as possible. We urge your passage of the legislation without delay.

Senator KASTEN. Thank you very much, Mr. Rosen.

I am going to try first of all to go through the entire panel, and I once again urge you to keep your statements within the 5 minutes. At that point we will begin questioning of the entire panel.

The next witness is a fellow Wisconsinite, Louise Trubek, who is the executive director of the Center for Public Representation in Madison, Wis.

Louise.

Ms. TRUBEK. Thank you. Good morning. I am Louise Trubek, executive director of the Center for Public Representation, and I am grateful for the opportunity to give some input into the proposed product liability changes.

Founded in 1974 to speak out for traditionally unrepresented or unorganized groups and individuals in Wisconsin, the center is a private, nonprofit, tax-exempt corporation. Currently, CPR is concentrating its resources in assisting consumers, the elderly, handicapped persons and children.

The Product Liability Act prepared by the staff of Senator Kasten seeks to codify existing products liability law under a simple, comprehensive Federal statute. As such the bill represents a dramatic departure from existing products liability law which is presently a common law doctrine and developed largely through the State courts.

The effect on consumers of enacting the PLA would be substantial. Because a comprehensive analysis of the bill would be a Herculean task, I have opted to limit my analysis to two parts: one, on traditional tort law doctrines of plaintiff compensation; and two, consumer rights under the Federal preemption clause.

The purpose of any tort system is twofold: to adequately compensate injured persons and to deter negligence. Unfortunately, under the present system neither goal is reached. The present system is flawed because economic and institutional impediments combine to inadequately compensate the injured.

The present system does not adequately compensate injured persons because compensation requires admission to the adjudicatory process, and substantial barriers presently exist to deny many plaintiffs admission. Efforts need to be redirected toward breaking down the barriers presently preventing most injured parties from even filing a claim.

The reason for an injured's exclusion from the adjudicatory process are several. The injured's potential recovery is not worthy of a lawyer's efforts; the injury is difficult to prove; and the injured is poor and cannot bear the cost of pretrial expenses. Thus, someone poor or with a small injury difficult to prove stands little chance of receiving compensation. The injured's right to compensation is denied because the lawyer is unwilling to place at risk a firm income for the speculative chance of winning an award. Thus, formal entry into the adjudicatory process, the only avenue for compensation requires some money and an attractive injury.

Put simply, the present tort compensation system does not adequately compensate plaintiffs. To provide adequate compensation, changes to the present tort system should provide easier access and less expensive access to the formal adjudicatory process. However, the PLA proposed here today does not provide easier access to the adjudicatory process. In fact, the bill does not even address the issue. The barriers to an injured's compensation are left intact because codified products liability law under a Federal statute does nothing for the injured who is poor or with a small or difficult to prove injury. That person still remains outside the adjudicatory process.

Not only is the PLA a radical departure from the present products liability law, it also preempts State law. Any product liability action based upon State or Federal law under any of the theories of strict liability in tort negligence, breach of warranty, et cetera, is superseded by this act.

The most controversial and unacceptable provision of the bill is that it will supersede existing product liability law. To supersede means to replace or displace, and to do so without any regard to the relative merits of existing laws. Any local efforts to provide the needed additional protections for consumers injured by products would be frustrated by the preemption clause. Rather than assuring federally mandated minimal standards of care in the manufacture of products, this act will result in the curtailment of valuable rights.

This suspension of consumer rights would occur in Wisconsin were the PLA enacted. Presently the judicially created law on product liability recognizes no statute of repose. The absence any such statute in Wisconsin demonstrates a local policy decision that the benefits gained by manufacturers do not outweigh the loss of valuable protection of substantive consumer rights.

The PLA requires a 10-year statute of repose. The preemption clause would require that Wisconsin consumers be barred from bringing action against manufacturers after 10 years, even though Wisconsin judges and legislature have previously determined that a consumer's right to compensation from injury outweighs the manufacturer's pecuniary interests as shown by their rejection of such proposals.

The center, therefore, resists legislation, including the preemption clause, because the bill's effect as it is presently written is to foreclose any possibility of further safeguarding Wisconsin consumers' rights to adequate redress of product-related injuries.

Accident prevention and compensation of injured are important public policy goals. Presently the subject is being actively discussed at the State level, and creative experiments may arise from the discussions.

The great strength of federalism is the opportunity for State diversity. 1982 is exactly the wrong time to freeze that ferment by passing a uniform preemptive law that reduces consumer rights and protection.

[The statement follows:]

STATEMENT OF LOUISE G. TRUBEK, EXECUTIVE DIRECTOR, CENTER FOR PUBLIC REPRESENTATION

I am Louise Trubek, Executive Director at the Center for Public Representation (CPR). CPR is grateful for the opportunity to provide consumer input into the legislative decision-making process by addressing the proposed product liability changes.

The Center for Public Representation has developed into a nationally-known advocate for consumers, the elderly, children, low-income groups and handicapped people, and into a leading research, training and publication-producing institution. Founded in 1974 to speak out for traditionally unrepresented or unorganized groups and individuals in Wisconsin, CPR is a private, nonprofit, tax exempt corporation. CPR since its founding over eight years ago has conducted a variety of programs, related to its mission of speaking out for unrepresented groups and individuals. Currently CPR is concentrating its resources and talents on assisting consumers, the elderly, handicapped persons, and children; these groups were selected by the Board of Directors with staff and community input, through an examination of community needs, resources and staff experience. Researching problems, training on issues for lawyers and non-lawyers, providing citizen information and individual representation, and appearing before government agencies and courts are the techniques CPR uses to increase the voice of client groups.

The Product Liability Act (P.L.A.), prepared by the staff of Wisconsin Senator Robert Kasten, seeks to codify existing products liability law under a simple, comprehensive, federal statute. As such, the bill represents a dramatic departure from existing products liability law which is presently a common law doctrine and developed largely through the state courts.

The effect on consumers of enacting the P.L.A. would be substantial. Becuase a comprehensive analysis of the bill would be a Herculean task, CPR has opted to limit its analysis to this bill's effect on: (1) traditional tort law doctrines of plaintiff compensation and (2) consumer rights under the federal preemption clause.

The purpose of any tort system is twofold: (1) to adequately compensate injured persons and (2) to deter negligence. Unfortunately, under the present system neither goal is reduced. The present system is flawed because economic and institutional impediments combine to inadequately compensate the injured.

The present system does not adequately compensate injured persons because compensation requires admission to the adjudicatory process and substantial barriers presently exist to deny many plaintiffs admission. Efforts to enhance recovery for a class of injured already admitted to the adjudicatory process misses the point. Efforts need to be redirected toward breaking down the barriers presently preventing most injured parties from even filing a claim. By focusing on the entire population of injured patients, the conclusion is that woefully few injured ever receive any compensation at all. The reasons for an injured's exclusion from the adjudicatory process are several: (1) the injured's potential recovery is not worthy of a lawyer's efforts; (2) the injury is difficult to prove; and (3) the injured is poor and can not bear the cost of pre-trial expenses. Thus, someone poor, or with a small injury difficult to prove, stands little chance of receiving compensation. The injured's right to compensation is denied because the lawyer is unwilling to place at risk a firm income for the speculative chance of winning an award. Thus, formal entry into the adjudicatory process, the only avenue for compensation, requires some money, and an "attractive" injury. Put simply, the present tort compensation system does not adequately compensate plaintiff. To provide adequate compensation to the injured, changes to the present tort system should provide easier access to the formal adjudicatory process.

The Product Liability Act does not provide easier access to the adjudicatory process. In fact, the bill does not even address the issue. The barriers to an injured's compensation are left intact because codified products liability law under a federal statute does nothing for the injured who is poor, or with a small or difficult to prove injury. That person still remains outside the adjudicatory process under the P.L.A.

Not only is the P.L.A. a radical departure from the present products liability law, it also preempts state law. Any product liability action based upon state or federal law under any of the theories of strict liability in tort, negligence, breach of warranty, failure to warn or instruct, or misrepresentation is superceded by this act. The most controversial and unacceptable provision of this bill is that it will supercede existing product liability law. To supercede means to replace or displace and to do so without regard to the relative merits of existing laws. Any local efforts, whether judically or legislatively inspired, to provide the needed additional protections for consumers injured by products, would be frustrated by the preemption clause. Rather than assuring federally mandated minimal standards of care in the manufacture of products, this act would result in a curtailment of valuable rights.

This suspension of consumer rights would occur in Wisconsin were the Product Liability Act enacted. Presently, the judicially created law on product liability recognizes no statute of repose. Absence of any such statute in Wisconsin demonstrates a local policy decision that the benefits gained by manufacturers do not outweigh the loss of valuable protection of substantive consumer rights. The P.L.A. requires a 10 year statute of repose. The preemption clause would require that Wisconsin consumers be barred from bringing actions against manufacturers after ten years even though Wisconsin judges and legislature have previously determined that a consumer's right to compensation from injury outweighs the manfuacturer's pecuniary interests, as shown by their rejection of other such proposals.

CPR resists any legislation including a preeemption clause because the bill's effect is to foreclose any possibility of further safeguarding Wisconsin consumers' right to adequate redress of product-related injuries.

Accident prevention and compensation of injured are important public policy goals. Presently, the subject is being actively discussed at the state level and creative experiments may arise from the discussions. The great strength of federalism is the opportunity for state diversity. 1982 is exactly the wrong time to freeze that ferment by passing a uniform, preemptive law that reduces consumer rights and protection.

Senator KASTEN. Thank you, Louise.

The next participant is Mr. Robert Butler, representing the National Association of Manufacturers.

Mr. Butler.

Mr. BUTLER. Good morning, Mr. Chairman. My name is Robert A. Butler. I am appearing today in my capacity as vice chairman of the National Association of Manufacturers' Product Liability and Employee Compensation Systems Committee, and chairman of its product liability legal task force.

I am chief litigation counsel for Union Carbide Corp. in charge of the corporation's product liability litigation. I have been involved in product liability cases and counseling for Union Carbide since 1969. I participate in and direct the conduct of product liability cases and trials.

The National Association of Manufacturers represents approximately 12,000 member companies, 80 percent of which are small businesses. In the summer of 1980 NAM formed its product liability legal task force to study legislative proposals and their potential impact on the current product liability situation. Within our legal task force numerous legislative possibilities have been debated, and what NAM believes are well-thought-out positions and recommendations have been developed and expressed to those interested in drafting Federal legislation.

The National Association of Manufacturers urges the 97th Congress to enact fair and equitable product liability reform legislation which balances the rights and obligations of both product users and manufacturers.

NAM strongly supports the concepts of Federal legislation which are embodied in the Senate working draft No. 2.

Today I would like to convey to you some of the aspects of the current product liability system that led the Nation's manufacturers to urge Federal legislation.

Efforts to restate the product liability rules in clear and certain terms in the State legislatures have generated an awareness of the problem. However, the State legislatures simply have not generated legislation which restores product liability to clear, balanced, and reasonable rules based upon fault.

To date, no State has adopted the Uniform Product Liability Act developed by the Department of Commerce. The statutes that the States have enacted are not uniform. As Commerce Secretary Malcolm Baldridge has noted, no two laws are the same, and the problem of lack of uniformity among States has become even more pronounced.

NAM strongly believes that if there are to be uniform and balanced product liability rules, there must be Federal legislation. The current situation is that the courts are continuing to systematically alter the rules that traditionally have established a balance of rights and obligations between all of the parties. Through judicial activism the courts are allowing more claimants to recover without proving that their injury resulted from the negligent conduct of the manufacturer.

Traditionally, manufacturers were responsible for the exercise of reasonable care in both the design and the development of warnings for a product. Product users were also obligated to exercise reasonable care with respect to their use of products. For two decades now, however, the courts in imposing liability have been removing these requirements.

NAM endorses the revisions in the law proposed in the Senate staff working draft No. 2 as reasonable steps toward fairness and equity. As a result of the advances in science, medicine, and engineering that have occurred in recent times, the persons who serve as jurors are increasingly required to decide complex questions in these fields of learning. At the same time, courts have been giving dignity to supposed medical, scientific, and engineering experts who have weak academic training, often have little or no actual work experience in their purported fields, and often have gained their expertise with respect to the product within a short time before the trial.

NAM supports the staff working draft as a positive step toward establishing that there must be substantial scientific, technical, or medical support for the plaintiff's claim.

The number of product liability cases has been growing continuously. There has been a major increase in claims consciousness. Attitudes have shifted toward a psychology of entitlement and a sue syndrome.

NAM's Product Liability Committee believes that there is a growing awareness on the part of the American public and the plaintiffs' bar as well that there is a gambling chance to get rich quick through product liability litigation. Plaintiffs' lawyers customarily receive a fee which is often one-third of a recovery. Keep in mind that if the recovery in a case is $3 million, the plaintiff's attorney's fee is $1 million. We must also keep in mind that consumers ultimately pay the cost of the increasing number of product liability cases in the prices of the products that they purchase.

The NAM believes that the modest proposal that the Senate is currently considering will have a screening effect as to those cases that are brought on tenuous grounds on allowing just compensation for claimants injured by a manufacturer's negligence.

Even with the enactment of the concepts in the Senate staff working draft, product liability will still involve significant dollar amounts for all businesses, large and small. There is virtually no limit on the dollar amount that sometimes sympathetic juries can award to plaintiffs. Adverse verdicts can be $75,000, $200,000, $1 million or even $5 million. However, in deciding whether to go to trial or to negotiate a settlement to reduce the risk of losing at trial, at least if the Senate staff working draft is enacted, the manufacturers will be able to make a choice knowing that the rules applied will be more fair and equitable than they are today.

NAM believes that there are certain essential elements of effective Federal legislation. These are set out in my written statement, and I request that our statement be included in the record.

Accompanying me today is William R. Rumble, president of G.F. Goodman & Sons, Inc., and an active member of NAM's Product Liability and Employee Compensation Systems Committee. Mr. Rumble will follow my statement.

Mr. RUMBLE. Mr. Chairman, I am president of G. F. Goodman & Sons, Inc., a Pennsylvania firm which employs 10 workers, including myself. I have been active in NAM's product liability efforts since 1978. We manufacture specialized machinery for the rubber and plastics industries. Over the last 7 years our annual sales have ranged between approximately $500,000 and $735,000.

G. F. Goodman & Sons was founded in 1920 as a machine shop doing general repair work. During World War II we operated as a subcontractor for defense plants in Philadelphia. After the war the company started repairing and building machinery for local rubber products manufacturers. Today we are almost exclusively a machinery manufacturer.

When the product liability situation is being debated I am mildly amused when it is stated that a single product liability suit could easily destroy a good healthy firm with sales as small as $1 million. Of course, I agree, but I have my doubts as to how many of those debating the issues really comprehend the impact of product liability on a small manufacturing firm such as ours.

Throughout our 62-year history eight product liability suits have been filed against us, seven of them since 1976. None of these claims are, in my judgment, claims in which we should be wholly or perhaps even partially liable. However, each of those claims create the potential for a large judgment only because we manufactured the machine on which a person was injured. The injured party's actions and those of his employer appear not to matter in the eyes of the courts.

G. F. Goodman is not alone. Many manufacturers are held liable only because they manufacture products on which a worker was injured. If someone is injured because we did not exercise due care, then we should pay. However, when the injuries are not the fault of the manufacturer, we should not be held liable.

Traditionally, the American legal system has been based upon a careful balance of rights and obligations of all parties. Unfortunately, as pointed out, that is not the current situation in the area of product liability.

I would like to give a brief review of some of the cases that we have had against us. The first case involved a maintenance worker who leaned on a moving conveyor belt—and I stress the fact that it was moving—to observe how a maintenance mechanic was performing a particular job. A guide along the side of the conveyor had been removed. It could well have prevented this injury. The conveyor carried the man's hand through a bite of the machine's feed rolls. No skin or bones were broken. We had no product liability insurance at the time, and our attorneys estimated that if we went to trial and lost the case, the jury award was likely to be in the $20,000 to $25,000 range. The additional cost of defending our case would probably be almost as much as settling the case. As we were in no position to absorb an award of this size plus the legal cost, we settled.

I am no mathematician. However, my estimate is that out of the $11,000 to G. F. Goodman & Sons, who in my opinion was without fault, the injured worker received less than $5,000 after the employer recovered the amounts of workmen's compensation benefits paid, the claimant's attorney took a customary one-third or $2,500, and our defense attorney's fees of $3,500.

Small businesses simply cannot afford such an inequitable compensation system. Only a small portion of the cost actually goes to the claimant in any event.

Case 2 involved an injury to a supervisor who was operating a machine in a questionable manner apparently mandated by his employer. It was this that led to his injury. Fortunately, we were able to obtain insurance coverage in 1972. Over the past 7 years the cost of our product liability insurance coverage has risen from less than ½ of 1 percent of our sales to over 3 percent of our annual sales. And in fact, as our anniversary date approaches next month, I am facing the possibility of an increase of 30 percent or more of my product liability insurance.

Case 3 involved little if any actual injury, a bruised hand. However, it required the expenditure of $3,300 in legal fees before the plaintiff's attorney left the case, apparently seeing that little or no financial gain was in sight. To avoid further transaction costs our insurer settled with the claimant for $1,200.

Cases 4 and 5 involved two workers at the same plant on the same piece of equipment which was 22 years old at the time the injuries occurred. We have not seen the equipment since it left our plant in 1955. The first injury was the result of an inexcusable act of an employee, removing a guard and cleaning internal components of the machine with a wire brush while the machine was running. He sustained an injury to one finger. The second man put his hand inside the machine while it was running and caught two fingers in a chain drive. Each of them is asking for $1 million.

How can a manufacturer control the actions of those operating the machine which it sold so many years ago. The worst injury involved in any of our products resulted in the loss of the thumb and two fingers. Unfortunately, this man's other hand and arm were congenitally deformed. I was as sympathetic as the jury was. However, I do not believe my company or any other manufacturer should be required to compensate this man, if we were not at fault, for his unfortunate dilemma.

In this case the employer actually completed the assembly of the machine on which this injury occurred. The improper installation of in feed and discharge conveyors and associated guards in our opinion caused the accident. Under the laws of the State in which the trial was held we should not have been held liable. However, we were found liable, and we are appealing the verdict.

Case 7 involves a piece of equipment originally sold to a firm in Massachusetts that has been resold several times until finally an employee of a plant in New Jersey was injured. Somewhere along the way the machinery was altered by replacing our original two-hand control system with a single pushbutton operation and raising the machine on a sub-base which permitted the operator to be closer to the cutting point. If the machine had not been altered, the worker would have been some 4 to 5 feet above the cutting point. I believe that alteration of this product or any product should be a defense against liability by a manufacturer.

The most recent case we sustained involved an employee who had been the subject of 11 workplace injuries over a 2-year span. He was injured on a piece of equipment that had been in place for 10 years without incident. Our involvement in this case appears minimal. However, we and our insurers will be in all likelihood required to spend thousands of dollars on a case not caused by anything we did other than our being a machinery manufacturer.

We are not alone in defending against such cases. All manufacturers, large and small, are subject to unlimited financial risks with every product that goes out its doors regardless of the standard of care utilized in placing the product into the stream of commerce. Each case requires a significant amount of time and personal involvement on the part of the small businessman. We do not have in-house attorneys to handle such matters, and much time normally spent running the business is consumed in our defense of these claims.

The current cases that remain open threaten the financial security of our firms. Cases similar to these filed in the future on tenuous grounds threaten the security of all businesses.

The substantial cost associated with these cases must be added to the cost of the machinery that we sell. Unfortunately, these increases do not provide our customers with a better piece of equipment. Simply put, inflated costs attributable to product liability make it difficult for small businesses such as ours to be competitive. These costs represent funds a company cannot use to improve their products, to improve their productivity, or to expand its sales.

Small manufacturing businesses throughout the country are shutting down. As each discontinues operations, so goes several more jobs for U.S. workers.

The continuing expansion of the inequities in the current product liability system creates serious doubts in my mind as to the ability of small U.S. manufacturing concerns to continue in the future.

The NAM commends this subcommittee for its role in the enactment of the Risk Retention Act, and we encourage Congress to now address the more important underlying substantive inequities in the product liability system.

It must be recognized that the affordability and the availability of insurance only reflects the degree of risk associated in product design, manufacture and sale, and the track record of a company as to the standard of care it utilizes.

We believe that certainty in predicting that degree of risk will only occur if Congress enacts Federal product liability tort reform.

Mr. Chairman, we appreciate this opportunity to present our views on Federal product liability tort reform and respectfully urge the 97th Congress to enact fair and equitable reform legislation that balances the rights and obligations of product users, manufacturers, and product sellers.

Thank you, sir.

[The statement follows:]

STATEMENT OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

Good morning Mr. Chairman, Members of the Subcommittee. My name is Robert A. Butler. I am appearing today in my capacity as Vice-Chairman of NAM's Product Liability & Employee Compensation Systems Committee and Chairman of its Product Liability Legal Task Force. I am Chief Litigation Counsel for Union Carbide Corporation in charge of the Corporation's product liability litigation. I have been involved in product liability cases and counseling for Union Carbide since 1969. I participate in, and direct the conduct of product liability cases and trials. Accompanying me is William R. Rumble, President of G. F. Goodman & Son, Inc. and an active member of NAM's Product Liability and Employee Compensation Systems Committee.

The National Association of Manufacturers is a diverse Association of small and large manufacturers. NAM represents approximately 12,000 member companies, 80 percent of which are small businesses. NAM also has an affiliation with an additional 158,000 businesses through its Associations Department and the National Industrial Council. NAM members manufacture almost every conceivable product line and produce approximately 75 percent of the nation's industrial output.

In the summer of 1980, NAM formed its Product Liability Legal Task Force, which I have chaired from the outset, to study legislative proposals and their potential impact on the current product liability situation. The Legal Task Force consists of a small group of lawyers who have considerable experience in product liability for various segments of industry. Within the Legal Task Force, numerous legislative possibilities have been debated and what NAM believes are well thought out positions and recommendations have been developed and expressed to those interested in and drafting federal legislation. In addition to our internal debates, the Task Force has discussed the issues and NAM's recommendations with law professors knowledgeable in the field. We have also discussed the issues with the Senate and House staffs.

To date, the work product of our efforts have been conveyed to Congress in a letter dated October 27, 1980 to the former House Subcommittee on Consumer Production & Finance and in letters dated May 1, 1981 and December 4, 1981 to this Subcommittee. These letters set forth our specific proposals and the reasons for our recommendations.

The National Association of Manufacturers urges the 97th Congress to enact fair and equitable product liability reform legislation which balances the rights and obligations of product users and manufacturers. While we have not yet thoroughly reviewed the Senate Staff Working Draft No. 2, disseminated on March 1, 1982, NAM strongly supports the concepts of federal legislation embodied in the draft. NAM will convey any concerns and recommendations developed by its Product Liability and Employee Compensation Systems Committee with respect to the particular language used.

Today, I would like to convey some of the aspects of the current product liability system that lead the nation's manufacturers to urge Federal legislation.

Efforts to restate the product liability rules in clear and certain terms in the state legislatures have generated an awareness of the need for legislative action. However, the state legislatures simply have not generated legislation which restores product liability to a clear, balanced and reasonable set of rules based on fault. To date, no state—not even one—has adopted the Uniform Product Liability Act developed by the U.S. Department of Commerce for voluntary adoption by the states. The statutes that the states have enacted are not uniform. As U.S. Secretary of Commerce Malcolm Baldrige noted on May 28, 1981, at the National Legal Center for Public Interest Conference on "Workers' Compensation and Workplace Liability," "no two laws are the same" and "the problem of lack of uniformity among the states has became even more pronounced." NAM strongly believes that if there are to be uniform and balanced product liability rules, there must be federal legislation.

The current situation is that the courts are continuing to systematically alter the rules that traditionally have established a balance of rights and obligations between all parties. Through judicial activism, the courts are making it easier for more injured plaintiffs to recover without proving that the injury resulted from the negligent conduct of the manufacturer. Traditionally, manufacturers were responsible for the exercise of reasonable care in the design and development of warnings of a product. Product users were also obligated to exercise reasonable care with respect to a product. For two decades now, in imposing liability, the courts have been removing the traditional requirements that the manufacturer failed to use reasonable care while allowing plaintiffs who failed to exercise reasonable care to recover. NAM endorses the revisions in the law proposed in the Senate Staff Working Draft as reasonable steps toward fairness and equity.

As a result of the advances in science, medicine and engineering that have occurred in the Twentieth Century, particularly in recent years, the persons who serve as jurors are increasingly required to decide complex questions in these fields. At the same time, courts have been giving dignity to supposed medical, scientific and engineering experts who often have weak academic training, have little or no actual work experience in their purported field of expertise and have gained their expertise with respect to the product within a short time before the trail. NAM supports Senate Staff Working Draft No. 2 as a positive step toward establishing that there must be substantial scientific, technical or medical support for the plaintiff's claim.

The number of product liability cases has been growing continuously. There has been a major increase in claims consciousness. Attitudes have shifted toward a "psychology of entitlement" and a "sue syndrome." NAM's Product Liability Committee believes that there is a growing awareness on the part of the American public and the plaintiff's bar that there is a "gambling chance to get rich quick" through product liability litigation. Plaintiffs' lawyers customarily receive a fee which is often one-third of any recovery. Keep in mind that if the recovery in a case is $3,000,000, the plaintiff's attorney's fee is $1,000,000. We must also keep in mind that consumers ultimately pay the cost of the increasing number of product liability cases in the prices of the products they buy.

The NAM believes that the modest proposal that the Senate is currently considering will have a screening effect as to those cases brought on tenuous grounds while allowing just compensation for claimants injured by a manufacturer's negligence.

Even with the enactment of the concepts in the Senate Staff Working Draft, product liability will still involve significant dollar amounts for all businesses, large and small. There is virtually no limit on the dollar amount that sometimes sympathetic juries can award to plaintiffs. Adverse verdicts can be $75,000, $200,000, $1,000,000 or $5,000,000. However, in deciding whether to go to trial or to negotiate a settlement to reduce the risk of losing at trial, at least if the Senate Staff Working Draft is enacted the manufacturer will be able to make a choice knowing that the rules applied will be more fair and equitable.

NAM believes that the following are essential elements of federal legislation:

Liability for commercial losses should be governed by contract law (that is, the Uniform Commercial Code) and not product liability tort law.

The legal standard for determining design defects should focus on material deficiencies in the design process and not simply on whether the plaintiff offers an improved or advanced design. The manufacturer's design process should be measured by the state of technical knowledge at the time of manufacture. The legal test should be definite and specific. It should encourage manufacturers to conduct appropriate pre-marketing risk/utility evaluations. If an alternative design is offered to argue that the design utilized was defective, the alternative should be workable based on technology that was feasible at the time of manufacture.

In failure to warn cases, the standard should be based on the manufacturer's negligence and there should be a limitation to the state of technical knowledge at the time the product was manufactured. When it is not feasible for the manufacturer to provide warnings to the actual user, a manufacturer should not be liable if it has provided warnings to the appropriate party (such as, the actual user's employer) and that party fails to transmit the warnings.

The law should require that there be substantial scientific, technical or medical support for the plaintiff's claim.

Manufacturers should only be liable for products that they actually manufactured. The so-called SINDELL theory of industry-wide liability should be rejected.

The offensive use of collateral estoppel should not be permitted. For example, in the event one jury finds a manufactuer liable, it is unfair to hold that the manufacturer is deprived of a trial on the facts in subsequent cases and is automatically liable to later claimants. If the law was otherwise, of 100 cases, a defendant might win 29 cases, lose one and thereby automatically lose the next 70 cases.

There should be a strong presumption based on compliance with federal regulatory requirements that the aspect of the product to which the requirements apply are not unreasonably unsafe. NAM urges further consideration of conclusive presumptions based upon compliance with certain Federal statutes. Punitive damages should not be awarded if the product is in compliance with government requirements.

The employer's lien against any settlement or verdict for the amount of workers' compensation, should be eliminated and the plaintiff's verdict should be reduced by the amount of the workers' compensation that the plaintiff receives or to which the plaintiff is entitled.

Comparative fault and apportionment of responsibility should apply.

Manufacturers of heavy equipment should not be required to bear the risk associated with a product forever and a day. NAM feels that you should consider a time limit on liability from the date of manufacture that would cover design and warnings cases that involve injuries from heavy equipment. Consistent with our brief, the statute, should not apply to diseases with long latency periods.

Evidence of most manufacturing changes with respect to design and warnings is prejudicial and should not be permitted to show that the product in question is defective.

Punitive damages should be limited to cases involving outrageous conduct and the judge should determine the amount of punitive damages.

Negligence should be the standard for wholesalers, retailers and other product sellers who are not manufacturers. In essence, the law should endeavor to return their liability to a fault system.

NAM respectfully recommends Congress to adopt the proposals summarized herein.

Mr. Rumble will now explain how the current inequities in the product liability system have affected his company.

Thank you Mr. Chairman.

As stated earlier, I am President of G. F. Goodman & Son, Inc., a Pennsylvania concern which employs ten (10) workers, including myself. I have been active in NAM's Product Liability efforts since 1978.

We manufacture specialized machinery for rubber, adhesives and plastics. Over the last seven years, its annual sales have ranged between approximately $500,000 and $735,000. G. F. Goodman & Son was founded in 1920 as a machine shop doing general repair work. During World War II, we operated on three shifts per day as a subcontracting machine shop for defense contractors. After the war, we started building machinery for local rubber products manufacturers. Today, we do very little repair work and almost exclusively in the machinery manufacturing business. When product liability is being debated, I am mildly amused when the belief is stated "that a single product liability suit could easily destroy a good, healthy firm with sales as small as $1 million." Of course I agree, but I also chuckle for I have my doubts as to how many of those debating the issues comprehend the impact of product liability on small firms and their business problems.

Throughout our 62-year history only eight (8) product liability suits have been filed against G. F. Goodman & Son, Inc., all since 1972. Below is a table outlining the injuries and dollars involved in those cases.

PRODUCT LIABILITY ACTIONS FILED AGAINST G. F. GOODMAN & SON, INC.—1920 THROUGH MARCH 1982

Date of injury	Alleged injury	Date suit filed	Alleged damages requested	Status
February 1967	Hand injury	March 1969	Amount not stated in complaint.	Settled in 1972 for $7,500; expended $3,500 in legal fees.
August 1975	Lost ends of 3 fingers	September 1976	$300,000	Open.
July 1976	Bruised hand	July 1977	Amount not stated	Settled in 1979 for $1,200; legal fees—$3,317.
February 1977	Partial amputation of 1 finger.	January 1978	$1 million (4 counts, $250,000 each).	Open.
September 1977	Injured 2 fingers	March 1979	do	Do.
January 1978	Loss of thumb and 2 fingers.	January 1980	$200,000 ($150,000 on 3 counts and $50,000 on 1 count).	On appeal; U.S. Dist. Court awarded $75,000 and $10,000 for wife.
January 1980	Crushed fingers	November 1981	Amount not stated	Open.
February 1980	Injured fingers	January 1982	Amount not stated	Do.

None of these claims are, in my judgment, legitimate claims in which we should be wholly or even partially liable. However, each of those claims create the potential for a large judgment only because we manufactured the machine on which a person was injured regardless of who was at fault. The injured party's actions and those of his employer appear not to matter in the eyes of the courts.

G. F. Goodman is not alone; many manufacturers are held liable only because they manufactured products on which a worker was injured. If someone is injured because we did not exercise due care, then we should pay. However, when the injuries are not the fault of the manufacturer, we should not be held liable. Traditionally, American jurisprudence has been based on a careful balance of rights and obligations of all parties. Unfortunately, as pointed out that is not the current situation in the area of product liability.

Case (1) involved a maintenance worker who leaned on a moving conveyor belt, and I stress the fact that it was moving, to observe how a maintenance mechanic performed a job. The worker's hand moved with the conveyor belt through a bite of the machine's feed rolls. No skin or bones were broken. We had no product liability insurance at the time. Our attorneys estimated that if we went to trial and lost the case, the jury award was likely to be in the $20,000 to $25,000 and that the additional defense cost would probably cost almost as much as settling the case.

I'm no mathematician, however, my best guess is that out of the $11,000 cost to G. F. Goodman—who in my opinion was without fault—the injured worker received less that $5,000 after the employer recovered the amount of workers' compensation benefits paid, his attorney taking a customary one-third ($2,500) and our defense attorney's fee of $3,500. Small businesses simply cannot afford such an inequitable compensation system, particularly when such a small portion of the cost actually goes to the claimant.

Case (2) involved an injury to a supervisor who was operating a machine in spite of a readily visible danger. Fortunately, we were able to obtain insurance coverage in 1972, but only at great expense. Over the past seven years, our product liability insurance coverage has costs approximately 3% of our annual sales.

The NAM commends this Subcommittee for its role in the enactment of the Risk Retention Act. NAM encourages Congress to now address the more important underlying substantive inequities in the product liability system. It must be recognized that the "affordability/availability" of insurance only reflects the degree of risk associated in product design, manufacture and sale, and the "track record" of a company as to the standard of care it utilizes. NAM believes that certainty in predicting that degree of risk will occur only if Congress enacts federal product liability tort reform legislations.

Case (3) involved little, if any, actual injury—a bruised hand. However, it required the expenditure of $13,317 in legal fees before the plaintiff's attorney left the case apparently seeing that no, or little, financial gain was in sight. To avoid further transaction costs we settled with the claimant for $1,200.

Cases (4) and (5) involved two workers at the same plant and the same piece of equipment. The first injury was the result of the inexcusable conduct of the employee cleaning the machine with a wire brush while the machine was running. The second man puts his hand inside the machine while it was running and caught his fingers in the chain drive. How can a manufacturer control the actions of those operating a machine which it sold years ago?

Case (6), the worst injury involving any of our products, resulted in the loss of the thumb and two fingers of the major hand. Unfortunately, this man has a congenitally deformed minor hand and arm from a birth defect. Talk about jury sympathy! I was sympathetic myself. However, I do not believe my company or any other similarly situated manufacturer should be required to compensate this man if we were not at fault for this unfortunate dilemma.

The employer in this case actually completed and assembled the machine he was injured on and the improper installation of in-feed and discharged conveyors and associated guards, in our opinion, caused the accident. Under Indiana law, we should not be liable, therefore, we are appealing the trial verdict. As the NAM interprets the Senate Staff Working Draft, if enacted, other manufacturers in other states similarly situated, would not be held liable, and properly so.

Case (7) involved a piece of equipment originally sold to a Massachusetts firm and resold several times before the injury occurred in New Jersey. Somewhere along the way, the machinery was altered by replacing the original two-hand control system with a single push botton operation which permitted the operator to be closer to the cutting point. If the machine had not been altered, the worker would have been some two to five feet above the cutting point. The NAM believes that product alteration should provide manufacturers with a defense against liability. There is simply no way a manufacturer can be expected to control the actions of those who purchase its products.

Case (8) involved a worker who sustained eleven (11) injuries in a two-year span of employment. It is not surprising that his employer fired him from the job. Our involvement in this case appears minimal, however, we and our insurers will, in all likelihood, expend thousands of dollars on a case not caused by anything we did other than being in the manufacturing industry.

G. F. Goodman is not alone in defending against such cases. All manufacturers, large and small, are subject to unlimited financial risks with every product that goes out its doors, regardless of the standard of care utilized in placing the product into the stream of commerce. Each case requires a significant amount of time and personal involvement on the part of a small businessman, we do not have in-house attorneys to handle such matters, and distracts time normally spent on running the business. The current cases that remain open threaten the financial security of our firm. Cases similar to these that may be filed in the future on tenuous ground threaten the security of all businesses.

These substantial costs must be added to the costs of the machinery we sell. Unfortunately, these increases do not provide our customers with a better piece of equipment. Simply put, inflated costs attributable to product liability make it difficult for small businesses like G. F. Goodman to be competitive. These costs represent funds a company cannot use to:

Improve products; improve productivity; or expand its sales market.

Small manufacturing businesses throughout the country are shutting down. As each discontinues operations, so go several more jobs for U.S. workers. The continuing expansion of the inequities in the current product liability system create serious doubts in my mind as to the ability of small U.S. manufacturing concerns to continue into the future.

Mr. Chairman, Members of the Subcommittee, the National Association of Manufacturers appreciates this opportunity to present its views on the need for federal product liability tort reform and respectfully urges the 97th Congress to enact fair and equitable reform legislation that balances the rights and obligations of product users, manufacturers and other product sellers.

Senator **Kasten**. Mr. Rumble, thank you very much.

The last member of this panel is Ms. Barbara Pequet who is the legislative director of the National Consumers League.

Ms. **Pequet**. Good morning, Mr. Chairman, and staff.

This subcommittee has the difficult task of balancing several competing interests in its consideration of whether Federal initiatives are needed in this area of personal injury from unsafe goods. We hope our testimony assists you in that task.

The National Consumers League, in its responding to the concerns of its State affiliates and individual members across the country, has been active in the product safety and products liability area for several years. We have testified numerous times on both products liability and risk retention bills, and before this committee and subcommittee.

Throughout its 83-year history NCL has fought for consumer and worker health and safety while advancing workplace and marketplace standards of fairness and equity. It is our concern for health and safety that brings us before the subcommittee today.

I would like to state at the outset that NCL is opposed to any Federal tort reform legislation which cuts off consumers rights and access to justice, curtails manufacturer incentives for safety, and limits consumers ability to obtain redress when they have been injured by the dangerous products.

SAFETY FIRST

It is true that a products liability problem existed a few years ago; that is, manufacturers and small businesses watched their product liability premiums skyrocket through no particular new or different fault of their own. Due in part to the cyclical nature of the industry, product liability insurance, always relatively available, has become relatively more affordable recently. In spite of that fact, manufacturers and product sellers continue to push at the State and now the Federal level to restrict consumer rights to go to court, to win, and to receive monetary compensation to atone for physical injuries and mutilations which result from a reasonable reliance on products that seemed to be safe but in fact were not.

Shortly after this "panic pricing" by insurers in the mid-1970's began to force some businesses to forgo coverage, the Commerce Department's Interagency Task Force on Product Liability issued a final report.

That report concludes there are three reasons for the rapid escalation of insurance fee: The first, the manufacturing of unsafe products; second, the liability insurance ratemaking procedures; and third, the uncertainty of the tort litigation system. However, the insurance study of the task force final report concluded, "The ultimate remedy of the product liability problem is to reduce the number and the severity of product-related injuries."

NCL agrees with this finding and the recommendation that the most important action needed is to bring about "an optimum investment in product safety."

If this subcommittee agrees with the holding of the task force, that safety and products manufacturing is the "ultimate remedy," then prosafety initiatives could be undertaken. For instance, the subcommittee could put together another national commission on product safety hearings. It has been 12 years since those investigatory findings compiled statistics on product safety.

The subcommittee could investigate methods to improve design and manufacturing standards and manufacturing practices.

It could consider expanding the authority of the Consumer Product Safety Commission. In the past 10 years this tiny agency has saved thousands of lives and several millions of dollars of cost to consumers from its work just in the area of product safety.

REFORM RATEMAKING

Let's look at the second potential solution for this problem: The liability insurance ratemaking procedures. You have heard a good deal this morning from Mr. Schwartz and you will hear in further testimony about the specific details of the ratemaking process. And I would like to refer you to our full testimony submitted to the committee.

But allow me to say here that the problem of lack of comprehensive data on such things as claim costs and payments and reserving practices, the subjective speculative lost reserves procedure, and the failure to account for investment income in ratesetting are among some of the ratemaking insurance problems which have kept premiums high.

In this area the subcommittee might help implement the Risk Retention Act which was signed into law last September by President Reagan. Businesses, for instance, could use some support from the Department of Commerce on "how to implement" booklets or model acts to know how to best set up these programs at the State level; investigate the success of State-passed reporting statutes; and work with the NAIC on developing some State-level data-gathering mechanisms.

TORT CHANGES

Finally, let us look at a third solution, the uncertainty of tort litigation and the "tort reform" proposals that have cropped up, often from manufacturers who wish assurances that they will not be sued.

The National Consumers League potentially could support Federal legislation to solidify manufacturer responsibility if such bills resulted in high, strong standards for safety. Unfortunately, tort reform has become synonymous with intrusions into consumer rights and consumer safety.

This second draft products liability bill or proposal before the subcommittee moves in that direction. It threatens to take away protections of legal actions on the behalf of injured individuals. In fact, this proposal could best be termed a manufacturer's liability exemption bill. Here, manufacturers are being told they do not have to worry about safety because frequently they will not be held liable for consumer injuries caused by their products. This is no solution to the products liability problem.

NCL is pleased to submit a much more detailed analysis of a line-by-line analysis of the bill, but I would like to summarize at least some of our initial concerns given the time constraint. There are many ways this bill reduces manufactures' responsibility. For instance, it eradicate strict liability. The draft bill overrules this particularly significant consumer cause of action, and we are opposed to that loss; overturns market share liability theory in the now-famous *Sindell* case which should be addressed in the next panel; provides the state-of-the-art defense for businesses in design, something that mitigates against safety and improvements in design; leaves ultimate consumers without warnings; reduces product sellers' responsibility to inspect and to inform of potential warnings; and establishes compliance with Government standards as a presumption of safety—a very invalid premise.

And there are other problems. The statute of repose for capital goods is a precedent-setting proposal that we feel is a very serious intrusion into the access to justice for consumers, something we would not want to see go on the record in any legislation.

In conclusion, NCL believes that the products liability problem cannot be resolved by cutting off consumer rights. The solutions lie in making safer products, making high standards for safety, and improving insurance practices.

Legislation at the Federal and State level may now be necessary to reverse some of the antisafety measures introduced at the State level in approximately 22 States. Federal legislation which uniformly promotes safety through the requirement of high standards of care and duty, which spreads the cost to the general public and thereby improves both safety and quality of life, could be helpful. This proposal before us or any legislation which cuts back on consumers rights and the current standard for safety is not needed.

Rather than preemptively impose a Federal manufacturers liability exemption bill on the States which have good standards for safety through the courts and through case law, NCL urges this subcommittee to hold field hearings on the safety and insurance needs of citizens. It has been 4 years since the States were given the opportunity to address this issue, even though this problem first surfaced at the State level. Therefore, all interested parties at the State level should be encouraged to tell this subcommittee what they want the Federal Government to do.

The National Consumers League is willing to work with this committee to develop reasonable, balanced legislation which will promote safety and fair practices in an increasingly complex marketplace.

Thank you.

[The statement follows:]

STATEMENT OF BARBARA K. PEQUET, LEGISLATIVE DIRECTOR, NATIONAL CONSUMERS LEAGUE

Good morning Mr. Chairman and Members of the Subcommittee. I am Barb Pequet, Legislative Director of the National Consumers League, and we welcome the opportunity to present to you our views on Senator Kasten's second draft product liability bill. This subcommittee has the difficult task of balancing several competing interests in its consideration of whether federal initiatives are needed in this area of personal injury from unsafe goods. We hope our testimony assists you in that work.

The National Consumers League, in responding to the concerns of its state affiliates and individual members across the country, has been active in the product safety and products liability area for several years. We have testified numerous times on both products liability and risk retention bills. Throughout its 80 year history, NCL has fought for consumer and worker health and safety while advancing workplace and marketplace standards of fairness and equity. It is our concern for health and safety that brings us before this subcommittee today.

IS THERE A NEED FOR PRODUCT LIABILITY LEGISLATION

Historical need for personal injury litigation

There exists a long-standing and undisputed need for consumers to receive compensation for personal injuries resulting from harm caused by unreasonably unsafe products. Long before the first internal combustion engine machine exploded and burned or crushed its first owner, laws have existed to protect consumers who relied on the safe functioning of products.

Three general social values are maintained through this system of laws which holds the manufacturer or product seller liable for a product capable of inflicting substantial harm if it is defective.

First, laws provide an incentive to manufacturers to improve products, to strive for and achieve reliable standards of safety, and, thereby, avoid costly law suits. The deterrence effect of these laws can be traced through the reduced percentage of suits brought over the years in any one specific hazard area. Products liability laws provide a social insurance for safety.

Second, law suits provide compensation to the unwittingly injured product user. While it is impossible to restore lost or permanently damaged body parts or functions, it is in society's interest in justice to make whole the harmed monetarily, and to hold liable the one who trades on the trust that no harm exists.

Finally, private personal injury lawsuits protect the marketplace by assuring fair dealing. Consumer confidence in products and purchases is bolstered by a fair system assessing liability. Similarly, the reputation and good will of an industry is enhanced where a body of laws encourages business to stand behind its products.

Today's need—now more than ever

Health and Safety Hazards are Increasing. In today's complex, technologically advancing world, products, goods and chattel and their components appear on the market in rapid pace. More products and more complex goods have yielded more product hazards.

Twelve years ago when the National Commission on Product Safety held hearings, it learned that each year 36 million citizens were injured by hazardous products and another 20 million were hurt seriously enough to require some medical treatment. Each year 30,000 Americans were being killed by defective consumer items and 110,000 permanently disabled. Consumers' injuries have increased with the numerical increase in market items.

This proliferation of products, combined with increasingly complex and scientific developments, has intensified the potential for hazards. Consumers today are exposed to but not warned of the dangers in approximately 50,000 untested chemicals. They are injured or killed by defects in design in airplane de-icing mechanisms, and DC-10 wing structures. Citizens die from defects in construction of hotel walkways and fire-alarm systems. As more products contain new, "advanced" but untested components, the likelihood is increased for previously unknown injuries to arise.

Finally, in today's economic slump, business' tendency to look for ways to cut costs and save money in the short run may result in cutting corners on health and safety measures. The result in the next few years and far into the future, will be more injured citizens who will need strong product liability laws to provide some final recourse for their suffering.

Deregulation Compels Access to Litigation. This administration's interest in reducing the size and functions of the federal government has already impinged on the effectiveness of the agencies mandated to protect citizen's and consumers' health and safety. Within one year we have seen reduction in the numbers of investigations, initiatives, and enforcements carried out to protect consumers in such areas as hazardous products, workplace safety, and environmental hazards. In a time when government is doing less to protect the consumers against dangers, it is especially crucial that strong laws uphold the rights of product users injured by shoddy goods, defective products, and dangerous consumer items.

Reduction of Legal Forums for the Poor. As the Legal Services Corporation and other programs providing forums for class action litigation and for remedies sought by the poor are abolished, affected citizens need to be protected by strong products liability laws. Laws protecting vulnerable citizens will indirectly help those not able to afford to sue in their own behalf.

Expectations of Safety. The current trend in products liability law is toward an increasingly more responsible standard of safety—toward strict liability. These laws, controversial and opposed by business, in fact reflect the publics' increasingly higher expectations of safety in products and goods. Liability without fault is imposed by strict liability in tort as a matter of public policy, and resulting from the grave risk of harm incorporated in placing defective products in the marketplace.

In sum, yes, progressive products liability laws in all the states are needed to promote good health and safety practices for all citizens.

IS THERE NEED FOR FEDERAL PRODUCTS LIABILITY LEGISLATION

Since the late 1970's "product liability legislation" rarely implies stronger, more safety-oriented legislation. In fact, these words have become synonymous with "tort reform" which refers to proposed changes in the tort law system which primarily relieve monufacturers and businesses of responsibilities and liabilities toward consumers harmed by unreasonably unsafe products.

"Tort reform" legislation which reduces safety incentives is not needed for the following reasons:

Proposed statutary changes not justified

The much touted product liability "crisis" of the late '70s has subsided significantly. Products liability insurance, always relatively available, has become more affordable recently. In spite of that fact, manufacturers and product sellers continue to push at the state and federal levels to restrict consumers rights to go to court, to win, and to receive monetary compensation to atone for physical injuries and mutilations which result from a reasonable reliance on products that seemed to be safe, but were not.

It is notable that no consumer has the right to go to court with a product liability claim until there has been a physical injury resulting from the use of a product. The injured consumer will not prevail unless the product is proven unreasonably unsafe. The movement to roll back consumer protections, however, has been founded often on faulty and inaccurate analyses of reasons product liability coverage has become seemingly unaffordable to many businesses.

An accurate understanding of this insurance problem begins, not with injured citizens, but with the insurance companies. A few years ago many companies drastically increased their premiums, in some cases by up to 1,000 percent. Manufacturers, instead of questioning the insurance industry's pricing practices, joined forces to blame consumers and injuries for increased litigation and extraordinarily large settlements. The Insurance Services Office's Product Liability Closed Claim Survey, however, showed that the insurance industry grossly exaggerated the number of product liability claims filed, the size of settlements, and the number of awards which go to consumers each year. It is a matter of legal record that two large insurance companies admitted they had misleadingly advertised that there were 1,000,000 claims in 1976 when in fact only 60,000 to 70,000 existed.

Safety First. In 1977, "The Final Report of the Interagency Task Force on Product Liability" found three reasons for the rapid escalation of insurance fees. Those reasons: the manufacturing of unsafe products; the liability insurance ratemaking procedures; and the uncertainty in the tort-litigation systems. In the words of the Insurance Study of the Task Force's Final Report, "The ultimate remedy to the product liability problem is to reduce the number and severity of product-related injuries."

NCL agrees with the finding and the recommendation that the most important action to be taken to address first what may be called a product-liability problem for consumers, manufacturers and insurers alike will be to bring about "an optimum investment in product safety".

Ratemaking Reform. Before changing consumers' access to justice, changes in insurance ratemaking practices should take place.

The Interagency Task Force concluded that, "(C)comprehensive data are not available on product liability claim costs, payments, premiums, reserving practices, amounts of products liability coverage provided by insurers, and other indicators of product liability procedures used by the industry." Under most insurance industry ratemaking practices such statistical substantiation is difficult to find.

Presently, product liability insurance coverage is sold in a package with other types of coverage. Although insurance companies in each state must file an annual statement with precise data on most types of insurance coverage, product liability data is not required uniformly.

Further, in the financial reporting of losses, the insurance industry may presently employ subjective, arbitrary judgment when accounting for its reserves. "Losses" includes the actual amount paid out on claims. "Losses" also includes money put in reserves to cover unpaid losses on claims reported, but not paid, and on claims thought to have been incurred, but which have not been reported. These speculative, over-reserved losses are used in figuring the profitability of insurers. Where rates are determined by subjective judgment, the profitability of a company, frequently lowered by over-reserved "losses", weighs heavily in determining premiums.

In the end, insurance companies may achieve both increased investment income and increases in premiums. The result—some businesses have to make serious sacrifices to afford coverage; others are forced to go without and risk liquidation if sued. Customers if injured can find themselves handicapped and uncompensated.

Existing Reforms. Last September President Reagan signed into law the Risk Retention Act. Now small businesses, unable to afford the high cost of product liability insurance, can form insurance cooperatives. For the first time they can insure themselves. The result will be increased competition within the insurance industry, more accurate loss reporting and attention to safety, and more accurate rate-setting for premiums.

However, this new mechanism has not yet been employed widely. The Department of Commerce has not written guidelines or "how-to-implement" booklets. Risk managers do not have models to help set up risk retention groups.

Before cutting back on consumer rights and remedies which have developed as the marketplace has developed over the last 140 years, this subcommittee could help consumers and business, particularly small business, by encouraging implementation of the existing remedies and reforms.

WHAT ISSUES OUGHT TO BE ADDRESSED BY FEDERAL LEGISLATION

NCL believes safety is the first priority. We therefore urge Congress to enact federal legislation only if it codifies the highest safety standards from the various states. No such provision is proposed in the draft bill before us.

The National Consumers League might recommend that federal legislation ensure the existence of strict liability in design and warnings, as well as in manufacturing as a safety standard for all citizens. Recent trends to hold liable collectively for injury the individually unidentifiable manufacturers of harmful products is cost-justified in today's marketplace and, we believe, should form the basis for a nationwide standard. Other prosafety provisions might also be considered.

Instead, the second draft products liability bill before this subcommittee moves in exactly the opposite direction. It threatens to take away protections against legal action on behalf of injured individuals.

NCL will pleased to sumbit a detailed, line-by-line analysis of this bill at a later date. Because it was made public just last week and because several changes are substantial, it has not been possible to give your proposal the careful analysis it deserves. However, I will summarize our initial concerns with the draft and supply additional comments next week.

Reductions in manufacturers' responsibility

Eradicates Strict Liability. This draft bill overrules a particularly significant consumer cause of action—strict liability. Under this theory, a manufacturer is strictly liable in tort when an article, placed on the market with knowledge that it is to be used without inspection for defects by consumers, proves to have a defect that causes injury to humans.

Even though neither intent to harm nor negligence exists in these actions: "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. . . . The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." *Escola* v. *Coca-Cola Bottling Co.*, 150 P.2d 436 (1944).

This is not the severe standard for safety that business claims. Strict liability is not absolute liability—the plantiff must prove both that a defect existed in the manufacturer's product and that the defect was the cause of the injury.

To reduce all standards of safety to the more narrow standard of negligence will reduce manufacturer incentives for safer products and the protection consumers receive once injured.

Negligence is a cause of action requiring the injured consumer to prove that the manufacturer either foresaw or should have foreseen that the claimant might be injured by a negligent act or ommission. Negligence is based on a reasonableness standard. Unfortunately, many defective products can harm consumers through no fault of the consumer, and yet not be the result of negligent acts. Stripped of strict liability causes of action, product users can be injured by defects, but, if the bill in its present form is passed, manufacturers will not be held responsible and injured citizens will go uncompensated.

Overturns "Market-Share Liability" Theory. A small percentage of product liability cases involve serious questions of identifying defendants. A 1980 California Supreme Court case, however, has found that where all defendants produced a product in exactly the same way and the specific manufacturer of the product which caused the plaintiff's injuries cannot be identified through no fault of the plaintiff, the manufacturers which shared a "substantial pecentage" of the market can be held liable for the portion of the judgment equal to that manufacturer's share of the market.

In today's world where cancers, disease and illness develop 20 to 30 years after use of an unknowingly harmful product, it is an impossible burden to require injured consumers to identify specifc manufactuers from earlier generations. The market-share liability theory is a reasonable solution to assessing liability in these unique and currently rather infrequent situations.

NCL does not want legislation which overturns this theory as set out in *Sindell* v. *Abbot et al.* (26 Cal. 3d 588).

Provides State of the Art Defense for Design. When considering the standard for reasonable care expected from a manufacturer using other, available technology and the state of scientific knowledge when the product was manufactured, it is important to remember that industry custom and practice do not conclusively establish whether a defendant took reasonable care or whether the product was in fact "defective." Courts can decide that an entire industry engages in unreasonably careless practices.

The bill before this subcommittee inhibits the advancement of safety in product design and manufacturing by giving consumer-claimants a new and more difficult standard of proof to meet. In addition to eradicating strict liability in design, this draft requires consumers to go beyond the negligence standard to prove that "substantial support" in the particular trade community existed to assure the manufacturer knew or should have known of the product's danger. This new standard is vague, will need litigation to define its meaning, and will be used by industry to escape liability under the already difficult-to-prove negligence cause of action. Where an industry agrees across the board that a low safety level of design is the technologically feasible limit, consumers will have no recourse. Contrary to advancing safety, this defense provides a built-in disincentive against developments in product safety and a strong incentive to maintain the status quo.

Reduces Incentives for Alternative Designs. Similarly, the hurdles are very high for consumers who argue that an alternative design exists to prove the injuring product is defective in design. The plaintiff must base recovery on this more narrow negligence standard. The plaintiff also must prove that industry supported the alternative design and that the alternative met a cost-benefit analysis set up by the manufacturer. The effect will be that alternative designs will be required of manufacturers only where their products are safer, cost less, and are "supported" by the manufacturing community in related fields.

Manufacturers will sense little reason to develop safe, new, alternative designs under this provision in the present bill.

Leaves Ultimate Consumer Without Warnings. Guarantees that the ultimate consumer receives necessary product information, warnings and instructions are eliminated under this bill. The assumption that, once the manufacturer has provided information to any one party all responsibility ends for conveying information and warnings best known by the manufacturer, is poor public policy. Doctors, employers, supervisors, and every intervening party between the manufacturer and consumer increase the probability that the ultimate consumer will not receive the necessary safety information. While it is "reasonable" to expect that important information will be passed on, it is not prudent to remove the ultimate responsibility from the manufacturer.

Reductions in product sellers' responsibility

One of the theories of liability most basic to defective products—the product seller's obligation to inspect—will be overturned by this bill. Currently some wholesalers and distributors take steps, such as inspection and testing, to insure they are not trading in defective goods. Fairness requires that every party which benefits from the sale of a product also be responsible for making sure the product is safe.

Compliance with Government standards becomes presumption of safety

Traditionally, consumer product safety standards have been minimum standards, a floor below which product safety cannot fall. Industry compliance with these negotiated levels of minimum safety has been one of several components in determining manufacturers' liability where harm has occurred.

This bill establishes compliance with government standards as an irrebutable presumption that a product is safe, a determination which can be defeated by only the highest burdens of evidence and a presumption of safety that is not valid. The injured consumer must overcome that presumption by meeting three tests: the inordinately difficult "clear and convincing" evidence standard; the existence of a safer, less costly design; and compliance with all other layers of standards—federal, state and local. The manufacturer, on the other hand, merely proves by the same evidence standard that his design was a "reasonably prudent" choice for him to make. Such discrepancies in treatment of consumers and manufacturers seem unjust.

Misuse or alteration will limit consumers rights

Consumers who use products in unusual but wholly safe ways, but are injured by defects, may be left uncompensated under this proposed bill. Traditionally, an unusual use of a product by a plaintiff will not relieve the defendant of liability if that use is foreseeable. If this bill becomes law, the manufacturer merely has to show that the consumer's use of a product was not "reasonable" even though use of the product was predictable.

Time limitations are arbitrary and unneeded

The absolute prohibition on suits against manufacturers of defective capital goods after 25 years is a serious intrusion on basic rights to sue. No matter how negligent or how culpable a manufacturer has been, if an injury has not occurred within the arbitrarily determined 25 years, a consumer is absolutely prohibited from seeking recourse. This precedence in limiting access to justice should not be allowed.

CONCLUSION

NCL believes the product liability problem cannot be resolved by cutting off consumer rights. The solutions lie in making safer products, setting high standards for safety, and improving insurance practices.

Legislation at the federal or state level now may be necessary to reverse some of the anti-safety measures introduced at the state level in approximately twenty-two states. Federal legislation which uniformly promotes safety through the requirement of high standards of care and duty, spreads the cost to the general public, and thereby improves both safety and the quality of life, is needed. This proposal, or any legislation which cuts back on consumers rights and current standards for safety, is not needed.

Rather than preemptively impose a federal manufacturers' liability exemption bill on states which have good standards for safety, NCL urges this subcommittee to hold field hearings on the safety and insurance needs of citizens. It has been four years since the states were given the opportunity to address this issue, even though this problem first surfaced at the state level. Therefore, all interested parties at the state level should be encouraged to tell this subcommittee what they want the federal government to do.

The National Consumers League is willing to work with this committee to develop reasonable, balanced legislation which will promote safety and fair practices in an increasingly complex marketplace.

Senator **KASTEN**. Thank you for your testimony.

It is difficult for me to understand. Here we have a person who just pointed out he has got eight cases pending, and his insurance rates are about to go up, possibly by 30 percent. Any one of those cases could wipe out his business. And yet, you made the statement that the problem is over. You said that this was a problem which existed a few years ago. Mr. Rumble is here at this moment, and he represents, I think, thousands of small businessmen. I know several in Wisconsin. The problem exists right now.

Ms. **PEQUET**. Yes; a problem exists for buying insurance and for compensating consumers who are hurt and injured, but the rates of some insurance premiums have begun to fall. There have been mechanisms put in place and others suggested to alleviate this insurance problem.

The State bills that were passing with a great flurry between 1976 and 1979 have abated. We are left with 23 States for the most part that have changed statutorily procedures in product liability laws. The problem is no different than it has been throughout. Safety is the issue. Consumers are being injured. Manufacturers need to be held liable.

Senator Kasten. But is there not a point at which some kind of commonsense has to prevail? In other words, in the example where a machine that was sold 20 or 30 years ago and presently has had a two-hand control removed and replaced by a one-hand control. How can you say that the altered machine is the responsibility of Mr. Rumble? And how can you say that Mr. Rumble and his small company with its 10 employees ought to be put out of business because of a mistake that was made, or an alteration that was made, by some party that he knew nothing about?

In other words, it seems to me that you just cannot blindly oppose any kind of legislation and at the same time say, when you referred to the State bills as antisafety, that 23 States have adopted antisafety bills. There is a problem out here, and it is a problem for small business people like Mr. Rosen and Mr. Rumble.

It seems to me that this legislature has got to deal with this problem. Otherwise, we are going to eliminate all but the huge companies who can essentially self-insure.

Ms. Pequet. I would not advocate that the small businesses ought to go out of business because people are being harmed. I would advocate that what legislation ought to do is not immediately cut off access to courtrooms for remedies once consumers have been injured, but instead to look at the problem prior to that result, to look at the specifics of each situation to allow the courts to work on a case-by-case basis, not to uniformly impose a standard that has not been tailored to the individual situation.

Senator Kasten. Let us get this straight. We are not cutting off access to courtrooms at all. What we are trying to do is establish a certain amount of uniformity, a certain amount of predictability, and an ability to establish some kind of reasonableness so that small businesses—forget about Mr. Rumble—that the 10 people that work for him or the 30 or 35 people—how many work for you, Mr. Rosen?

Mr. Rosen. Twenty-five.

Senator Kasten. The 25 people that work for Mr. Rosen. What is happening in this country right now is that small business is drying up. It is drying up due to a lot of reasons, but one of the big reasons is Government overregulation and the kinds of problems we are seeing in this area.

However, there are other reasons as well, and these are the areas we want to address.

Mr. Rumble, do you feel that the cost of product liability insurance and some of the associated costs and risks have caused your firm to be less enthusiastic about developing new product lines? We talked about that briefly with Victor Schwartz.

Mr. Rumble. Absolutely. It is constantly on my mind. We have actually turned jobs down that we felt were not worth the risk. A case in point, something, not a new product, a customer that bought a piece of equipment from us perhaps 20 years ago; he might have paid $800 or $900 for this piece of equipment and has used it continuously since then. He needs to replace a valve. I inform him that on that particular machine I cannot send him merely a replacement valve. It needs to be brought up to the current safety standards which will cost him $1,500. He refuses to spend that money. And yet, if one of his workers is injured on that piece of equipment, I am going to be held liable.

Senator **Kasten**. You said that you had eight cases pending, and if I remember, it seemed that they were all after 1976. Have you seen an acceleration in the number of cases brought? A couple of the people here on the panel with you feel the problem is going away.

Mr. **Rumble**. I find it accelerating, yes. In fact, since 1976 I dread the presence of the approach of the mailman, because with any day, any given day, if I hear the mailman there for more than just the perfunctory good morning, I know there is time for a signature to be made, and I've got another lawsuit.

Ms. **Pequet**. Senator, if I might respond to a few points. This bill does modify some legislative positions taken earlier. For instance, my concern about cutting off access to the courtroom does still exist vis-a-vis capital goods in this bill.

It exists where capital goods injuries must result within 25 years. If somebody, a worker, is harmed in the 26th year, the courtroom door is absolutely closed, no matter how negligent or how liable the manufacturer may be for that defect. That is cutting off access. Nevertheless that is better than previous drafts.

Government regulation, I agree, can be intrusive for the small business person. It seems to me a bit ironic that what we are talking about is imposing a Federal Government solution to what is a State-level problem. Maybe that ought not to be the direction of this legislative body. Maybe there are State-level solutions.

Senator **Kasten**. Wait a minute. You are saying two different things. You are first of all opposed. I think that at least the professor from Tennessee was honest, he said that he is opposed to a State law as well and that in fact he is opposed to the whole idea.

Would you support a Federal effort to reform product liability law if you thought it was reasonable and fair? Do you basically accept the idea that we ought to be doing business in the 50 States under roughly the same kinds of circumstances?

Ms. **Pequet**. Let me say I have no intention of not being honest. I would like to see the States take care of their problems, and we could do a better job to assist in achieving standards of safety. I do not think that is beyond feasibility.

It seems to me the courts are doing a good job. The State legislatures are not. If, at some point, we felt that Federal legislation would bring about better safety, higher standards for compensation for consumers, it is entirely feasible that we would support that.

Senator **Kasten**. I would like to just ask one question of Mr. Rosen. I know it is hard to get the microphone to him.

You are in the business, Mr. Rosen, of selling essentially used machinery which you from time to time, remodel and fix up.

Mr. **Rosen**. We call it recondition, Senator.

Senator **Kasten**. Now, on the case that you used as an example, could you go through the details of that once more? Was it $21 million?

Mr. **Rosen**. The suit is for $21 million. Our company understands the suit. We sold the machine in 1972 to a small manufacturer. The machine has operated for the last 8 or 9 years perfectly. The employee during a break period—why he decided to do this I do not know; I do not know if anybody knows—but he decided to fix something or do something on the machine.

He climbed on top of the machine, and there was a company rule that prohibited running any machines during break periods. And as he was laying over the top of the machine, his foot hit a lever which engaged the clutch. And he engaged the clutch, and he had loose clothing, which was also in violation of the company policy, which caught in the machine. He was dragged into the machine, and he was ultimately killed.

Senator **Kasten**. Now, was there any way that you could judge, or your lawyers could judge—I assume you were too small to have a legal staff; you have to hire lawyers—have they encouraged you to just simply settle? I mean you are just in limbo right now? You do not know what is going to happen? If this case were decided against you, would that be the end of the business?

Mr. **Rosen**. If the judgment at the end was $1 million or $1.5 million—I mean forgetting $21 million—that would be the end of the business. I mean we have a half a million dollars' worth of insurance with a small deductible. We can keep buying larger and larger. But the problem is where is the top of it?

Senator **Kasten**. Would you agree with the statement that the problem existed a few years ago but it seems to have leveled off now?

Mr. **Rosen**. Absolutely not. We have more claims now—and our business has declined in the last 2 years—than we have had prior to 1977.

Senator **Kasten**. So your experience is the same as Mr. Rumble's in that the number of claims and the number of potential lawsuits are accelerating?

Mr. **Rosen**. It seems that the word of mouth of the potential claim business is there, and the suits have accelerated.

Senator **Kasten**. We have a number of other questions here, but we have also another panel, and we are going to have to conclude the hearing by noon. So I would like to remind the panel, that there will be a number of additional questions from Senators who were not able to be here and also from the staff. We would like to submit those questions to you in writing and if you could get back to us within 10 days with responses to those questions we would appreciate it.

I would like to thank all of you, and particularly Louise Trubek, from Wisconsin, for your participation in this difficult effort. I think it is clear that there are many different controversies here that we are attempting to deal with, but I think that maybe we can work our way through some of them.

Thank you very much for your participation this morning.

The next panel includes Dr. Sidney Wolfe, Ms. Dolores Wallgren, and Prof. John Fleming. The first participant in the panel is Dr.

Sidney Wolfe, who is the director of the Public Citizens Health Research Group.

Dr. Wolfe.

STATEMENT OF DR. SIDNEY WOLFE, DIRECTOR, PUBLIC CITIZENS HEALTH RESEARCH GROUP, ACCOMPANIED BY ALLEN GREENBERG, STAFF ASSOCIATE

Dr. **Wolfe**. Thank you. There are three ways of regulating corporate behavior, all of which are essential in order to minimize the amount of damage done to people by dangerous products: First, is the flow of information via labeling, news, media, books, and other sources. Second, is traditional Government regulation, which you claim is Government overregulation and as one of the causes of problems with small businesses today. This regulation is the responsibility of FDA, OSHA, the Consumer Product Safety Commission, and other agencies.

And third, and the subject of these hearings, is the judicial process where, it is said, if there is an injury, there should be a remedy.

The past year has seen an unprecedented assault by business acting as the ventriloquist for Ronald Reagan and his colleagues, designed to—we hear business in the background making noise—weaken not only Government regulation of health and safety but also to cripple the flow of information to consumers, such as suspension of patient package inserts for drugs, canceling the workers' right to be informed of the names of chemicals to which they are exposed in the workplace.

The irony of the recent assault on the third method of regulating corporate behavior, the kind of approach embodied in the legislation under consideration by this committee, can be seen most clearly in the context of the assaults which I have just mentioned on the other two kinds of regulation.

As the daily news of decreased budgets, decreased regulation, decreased law enforcement in FDA, EPA, OSHA, the Department of Agriculture and other agencies keeps coming forth, it is accompanied by the implicit, and now often explicit, hue and cry, let the marketplace take care of it, let free enterprise work.

If the marketplace is to work as one of the ways of controlling corporate behavior, one of the essential features is making industry pay all of the cost of doing business. At the present time, only a small fraction of those injured or killed as a result of dangerous products or chemicals even attempt to use the courts as a way to get compensated for their damages.

The manufacturers of these products know that in most cases neither they nor their insurance carriers will have to pick up the tab for the damages done to people by their products. If anything, something should be done to make it easier, not more difficult, for people to get compensated in product liability cases.

The evolution of the common law has slowly begun to accomplish such a goal. It should be allowed to develop without interference from such disastrous anticonsumer legislation as staff working draft No. 2.

I would just like to make two or three other comments before turning it over to Allen Greenberg, also on the Public Citizen Health Research Group staff.

Ten years ago I remember testifying about what was then called the medical malpractice crisis, which in many ways is analogous to the crisis that is discussed today. It is interesting that one of the entities in the medical malpractice crisis, the hospitals, which bear much of the cost of malpractice, have sought a remedy which I think will eventually be the remedy for this problem. It is called risk prevention. We now see in sharp contrast to 10 years ago hospitals, working with the insurance industry, engaging in very significant and important programs for risk prevention.

It was felt eventually that the real cause of the medical malpractice crisis was medical malpractice, whether by doctors or hospitals. And I think the situation is similar here. Despite the anecdotes which we hear, and I am not saying they are not real anecdotes, I think they are just not that representative—and aside from some fussing around with numbers by the insurance industry, which Mr. Greenberg will talk about, the fact is there are dangerous products out there that are causing injuries.

A second comment I would like to make is that one of the elements that is most sharply increasing the amount of damages awarded in product liability cases is health care costs. The costs in this subeconomy have risen very rapidly, much more so than the rest of the economy.

And I would suggest that the people interested in the products liability should address themselves to health cost controls, although the last time this came up in the Congress, that industry bought out enough members of Congress to prevent that kind of legislation from going through.

A third item which certainly plays a major role in problems with small businesses in this country is the failure to enforce the antitrust laws. I would also hope that people concerned with small businesses would devote at least as much effort to enforcing the antitrust laws as they are to this particular approach.

In summary, we really need all three kinds of regulation. Neither Government regulation by FDA and other agencies nor the flow of information are sufficient by themselves. But particularly when the flow of information is being cut down and when the Government regulation is being weakened or crippled in a variety of ways, there is more need, not less need, for the common law to function as it has.

Allen Greenberg will now discuss some other aspects of this legislation. Jay Angoff of Public Citizen's Congress Watch will provide the committee with a detailed summary of the specific provisions in the bill. That will be handed in and hopefully made part of the record.

Senator **Kasten**. Mr. Greenberg.

Mr. **Greenberg**. Thank you. I will not read the rest of the statement. I will just summarize the major points in it. I would like to start by saying that this committee is operating on a faulty premise: that the product liability problem in this country, if indeed there is one, is the fault of tort law.

A few people have made reference to the Interagency Task Force report on product liability. What they have ignored, however, is the seven-volume legal study behind that report. In that seven-volume legal study there are a number of statements discussing the relationship between tort law and the alleged product liability problem.

I would like to read one of those statements. There are others in my testimony, and there are more in the report.

> The overall conclusion drawn here is that although specific tort doctrines adopted by some courts can be considered inequitable in specific cases, the total impact of such rules on product liability claims is insufficient to directly cause an insurance problem of the magnitude alleged. In other words, no inequitable doctrine or group of doctrines, even if changed immediately, could produce a greater availability of or lower cost for insurance.

This is something that has been ignored. If you then go further and look at that report in detail, you will see where the real problem lies. And the real problem, it seems to me and to the people who wrote the report, as well as to the Commerce Department task force that was formed on this issue, is in the insurance industry.

There are two aspects to the insurance issue, both of which, by the way, have been covered by hearings in the House, chaired by Mr. LaFalce. The two things are the subjective ratemaking practices of the industry and the failure to consider investment income when setting insurance rates. Unlike other types of insurance, product liability insurance is not, for the most part, based on actual experience with a particular product line. Most of the insurance, over 75 percent, is based on subjective factors that do not necessarily relate to real-life experience.

The Commerce task force report estimated that actuarially justified rates for the lines that they looked at would be 45.7 percent lower than the premiums actually charged. So any investigation into the product liability system and the availability and affordability of insurance must consider this issue.

There is also the investment income issue. When a manufacturer pays a premium to an insurance company for product liability insurance, the insurance company does not stuff the cash in a mattress somewhere, it invests it. And the investment income on those premiums is substantial. This is something else that is not being considered here. There are some figures in our testimony taken from the Commerce Department task force report that will give you an idea of the magnitude of this income and its consequence for ratemaking.

So when you consider these two issues, subjective ratemaking and investment income, you have a very real and a very direct cause of high, and sometimes unaffordable, premiums.

Another issue which has been mentioned here a couple of times is the Risk Retention Act which was designed to address the problem of unavailability or unaffordability of insurance. This law is now about 6 months old. Well, someone, I do not remember who, said that this was a separate issue from tort law. I really do not think it is. The discussion about a products liability crisis began in the middle or late 1970's with the claim that manufacturers could not afford insurance and that some way had to be found to deal with that. The Risk Retention Act was a direct attempt to deal with that problem. And to the extent that it has not been allowed to work, it really does not make much sense to come in here now and say, well, we have got to now start reforming the law to deal with the problem.

So I think that it is really unfair to say at this point, with this act only 6 months old, that we need major changes in tort law.

I would also like to make a point, which has been made by Professor Phillips and a couple of other people, which you might say is a little more philosophical, on the need for Federal tort law. Traditionally, this area of the law has been left to State courts. And the State courts have done, for the most part, a fair and reasonable job. It therefore seems to me that underlying all the statements of the manufacturers about the need for Federal products liability legislation is a distrust of the American judicial system. That distrust is now being translated into an effort to get the Congress to pass a law more to their liking.

I know that there have been statements by people saying, well, there is precedent for this, there is Federal law in areas similar to this. But the one fact that is not mentioned is that, for the most part, the legislation that has been cited gives concurrent jurisdiction to the Federal courts. It is not aimed solely at telling State courts how to rule.

So this law really is, in a sense, revolutionary. What you are doing is saying Congress is going to prescribe a statute for State courts to administer. Except for diversity cases, there is no Federal jurisdiction. That strikes at the heart of federalism and is unprecedented.

So, before you say that there is precedent for this kind of bill I would suggest that you look more closely at those precedents.

Senator **Kasten**. Thank you, Mr. Greenberg.

I just at this point want to point out, and I am sure you are aware—you made reference to the interagency task force on product liability and their report—I am sure you are aware that in that report they said that they recommended that risk retention must go hand in hand with product liability law reform. And they recommended some kind of a product liability form such as the one that we are working on today.

Mr. **Greenberg**. If you look at, as I said, not only the final report but the seven-volume legal study as well as the insurance industry and studies, you will see that one reason for the recommendation of tort reform was the uncertainty surrounding liability, even if it was not based on reality that existed in the minds of those setting the rates. But to relieve that uncertainty by changing the law, instead of attacking the ratemaking structure that allows subjective uncertainty to affect rates is, in my opinion, unfair.

Look at it this way: it seems to me, and I don't think anyone would disagree, that the best way to eliminate the product liability problem in this country is to pass a law that says "consumers and workers injured by defective products may not sue the person responsible for their injury." There is no question that this will solve the product liability problem. If consumers and workers do not have any more rights then manufacturers don't have a problem. Well, I hardly think that anyone would seriously propose such a solution. Yet what these bills do, to varying degrees, is precisely that; they solve a problem by taking away rights. Not only isn't that fair, but it won't do anything to avoid injuries in the first place.

[The statement follows:]

STATEMENT OF SIDNEY M. WOLFE, M.D., DIRECTOR, AND ALLEN GREENBERG, STAFF ASSOCIATE, PUBLIC CITIZENS HEALTH RESEARCH GROUP

There are three ways of "regulating" corporate behavior, all of which are essential in order to minimize the amount of damage done to people by dangerous products: First, is the flow of information via labelling, the news media, books and other sources; Second, is traditional government regulation, such as that done by FDA, OSHA, the Consumer Product Safety Commission, and other agencies; Third, and the subject of these hearings, is the judicial process where, it is said, if there is an injury, there should be a remedy. The past year has seen an unprecedented assault by business, acting as the ventriloquist (Edgar Bergen) for Ronald (Charlie McCarthy) Reagan and his colleagues, designed to weaken not only government regulation of health and safety but also to cripple the flow of information to consumers (suspensions of patient package inserts for drugs; cancelling the workers right to be informed of the names of chemicals to which they are exposed in the workplace).

The irony of the present assault on the third method of regulating corporate behavior—the kind of approach embodied in the legislation under consideration by this Committee—can be seen most clearly in the context of the assault on the other two kinds of regulation. As the daily news of decreased budgets, decreased regulation, decreased law enforcement in FDA, EPA, OSHA, the Department of Agriculture, keeps coming forth, it is accompanied by the implicit, often explicit hue and cry: let the "marketplace" take care of it, let "free enterprise" work. If the marketplace is to work, one of the essential features is making industry pay all the costs of doing business. At the present time, only a small fraction of those injured or killed as a result of dangerous products or chemicals even attempt to use the courts as a way to get compensated for their damages. The manufacturers of these products know that, in most cases, neither they nor their insurance carriers will have to pick up the tab for the damages done to people by their products. If anything, something should be done to make it easier, not more difficult for people to get compensated in product liability cases. The evolution of the common law has slowly begun to accomplish such a goal. It should be allowed to develop without interference from such disastrous anti-consumer legislation as Staff working draft number 2.

TORT LAW IS NOT RESPONSIBLE FOR THE ALLEGED PRODUCT LIABILITY INSURANCE PROBLEM

In its efforts to rewrite the law of products liability, this Committee is operating on a faulty premise—that the law governing the right of workers and consumers injured by defective products is responsible for a crisis in the product liability insurance market. Furthermore, at a time when the sentiment in this Chamber is to leave traditional state functions to the States—the essence of Federalism—it borders on the hypocritical to propose that Congress should dictate to the state courts the rules these courts must apply in product liability cases.

In the late 1970s, Congress and the American public were told by the insurance industry that the number of products liability claims filed each year had reached 1 million.[1] We were also told about cases that did not exist—such as the one about the court that granted a recovery to a consumer who was injured while using his lawnmower to trim the top of his hedges.[2] In short, using lies and distortions, the insurance industry and the business community engaged in an all out effort to convince us that unchecked judges and juries were driving businesses to ruin and causing products liability insurance rates to skyrocket.

These efforts began at the state level, where business groups lobbied state legislators to reverse the enlightened doctrines developed by the judiciary in the area of products liability. Having failed in their efforts to convince state lawmakers of the need for more restrictive tort law doctrines, these same interests are now attempting to make their case in Congress. They obviously hope to accomplish in one fell swoop what they could not accomplish piecemeal.

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[1] 126 Cong. Rec. H1675 (March 10, 1980) (statement of Rep. LaFalce).

[2] Product Liability Insurance: Hearings Before the Subcommittee on Capital, Investment and Business Opportunities of the House Committee on Small Business (Part 4), 95th Cong., 1st Sess. 1631 (1977) (statement of Tom W. Ryan, Jr., Staff Attorney, Missouri Public Interest Research Group).

However, Congress should be forewarned that the statistics and studies used by these self-interested industry groups are a far cry from the truth.

After months of careful examination, the Interagency Task Force on Product Liability (Task Force)[3] concluded that the claims being made by injured workers and consumers were not directly responsible for the alleged products liability insurance crisis.

> What emerges from the Research Group's statistical analysis and study of existing tort rules is a judgment that the volume and size of damage awards in all probability cannot be considered the direct cause of the alleged insurance problem.[4]

This theme runs throughout the Task Force's report. For example:

> The causes of the so-called insurance problem are complex, but it is possible that no aspect of the existing tort system may directly, or even indirectly be responsible for a lack of generally available and affordable insurance.[5]

> [T]he overall conclusion drawn here is that although specific tort doctrines adopted by some courts can be considered inequitable in specific cases, the total impact of such rules on product liability claims is insufficient to directly cause an insurance problem of the magnitude alleged. In other words, no inequitable doctrine or group of doctrines, even if changed immediately, could produce a greater availability of or a lower cost for insurance.[6]

There are other similar statements, all indicating that the root cause of the unaffordability or unavailability of insurance is not tort law. Rather, the real culprit is the insurance industry itself. The subjective ratemaking practices of the insurance industry, as well as accounting techniques that fail to consider income generated when insurance companies invest the premiums they collect from manufacturers are, in fact, the cause of any problem that exists regarding unavailability or unaffordability of insurance.

REFORM OF THE INSURANCE INDUSTRY

In discussing the relationships between the uncertainty in tort law and the premiums charged for products liability insurance, the Task Force observed:

> This atmosphere of uncertainty, at least in theory, can be reinforced by *perceptions* that the law is confused or inequitable, even if a close and technical examination shows that it is not. Thus, perceptions of reality become as important as reality when subjective judgments are being made.[7] (Emphasis added.)

What the Task Force was referred to is the product liability ratemaking system which relies, not on factual data reflecting actual claims experience with particular products, but on the subjective impressions of the person setting the rate as to what that experience is. Because these rates, known as (a)-rates, are not based on the volume or size of claims actually made by those injured by particular products, they are generally higher than warranted.

In analyzing (a)-rates for the policy years ending in December 1975 and December 1976, the Department of Commerce Task Force on Product Liability and Accident Compensation (Commerce Task Force) found that actuarially justified rates, that is rates calculated by considering the actual amount of money paid out on claims made against the product, would be 45.7 percent lower than those actually suggested.[8] (a)-rating, which accounts for 75 percent of all product liability insurance rates,[9] is therefore a direct and obvious cause of high products liability insurance rates—a cause that tort reform bills do not address.

Another insurance related reason for high premiums is the failure of insurance companies and state insurance regulators to account for investment income in setting rates. When a manufacturer purchases products liability insurance the premiums it pays for that insurance are invested by the insurance company. However, in setting rates for insurance the income from this investment is disregarded. The factors that are considered in rate setting are, put simply, the amount the rate setting organization[10] believes the insurance company will pay out in claims (roughly $.50 on each premium dollar) and the company's expenses and taxes. The rate also allows for a 5 percent profit (underwriting profit). However, because the insurance company does not pay out the 50 percent set aside for future claims until years after the premium is paid,[11] the invested premiums generate substantial income to the insurance company.

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[3] The "Task Force," as used here, refers to the three organizations that conducted studies pursuant to contracts with the Department of Commerce. Their work resulted in a seven volume legal study, a two volume industry study and a one volume insurance study. These volumes formed the basis for the "Final Report" of the Interagency Task Force on Product Liability. See Interagency Task Force on Product Liability, "Final Report," p. I-1-2. (1977).

[4] Interagency Task Force on Product Liability, "Final Report of the Legal Study" (Legal Study), Vol. III, pp. 131-132.

[5] "Legal Study," Vol. III, pp. 132-133.

[6] "Legal Study," Vol. III, p. 126.

[7] "Legal Study," Vol. III, p. 128.

[8] U.S. Department of Commerce, Task Force on Product Liability and Accident Compensation, "Report on Product Liability Insurance Ratemaking (Ratemaking Report)," p. 44.

[9] Hearings (part 2), supra n. 2, p. 539 (statement of Mavis A. Walters, Vice-President, Insurance Services Office).

The Commerce Task Force calculated this investment income. Assuming that premiums were invested at 7 percent, a modest interest rate by today's standards, the insurance company would realize $24.50 ($17.29 discounted to present value) on each $100 of premium written. Invested at 9.5 percent, this same $100 would yield $40.94 ($24.61 present value).[12] Furthermore, these amounts are in addition to the 5 percent underwriting profit provided for in the insurance rate. The Commerce Task Force concluded:

> Thus, considering overall profitability most conservatively—and assuming merely that an insurer is able to earn a 7 percent pretax rate of return on its investments, discounting this stream of income to reflect its present value and taking into account investment income and Federal income taxes—an insurer minimally has a projected profit of 21.62 percent of sales.[13]

Even with our most conservative assumptions, it is evident that substantial profits are available from writing product liability insurance.[14]

Yet these profits are not reflected in product liability insurance rates. If they were, rates would surely decline.

THE PRODUCT LIABILITY RISK RETENTION ACT

While not directly addressing these two issues, subjective ratemaking and investment income, the Congress has taken one step to deal with the problem of unavailability or unaffordability of products liability insurance. Just last year, Congress passed, and President Reagan signed, the Product Liability Risk Retention Act of 1981. As expressed in the House Report, this legislation is designed to "reduce the problem of the rising cost of product liability insurance by permitting product manufacturers to purchase insurance on a group basis at more favorable rates or to self-insure through insurance cooperatives called 'risk retention groups.' "[15] Even though this law is scarcely six months old, manufacturers and their Congressional allies are already proclaiming the need to drastically alter tort law concepts in order to solve a questionable insurance problem. Why not give the Risk Retention Act a chance to work before attempting to redefine or eliminate basic consumer rights?

TORT LAW SHOULD BE LEFT TO THE COURTS

Our final objection to a federal products liability bill is philosophical. For literally hundreds of years, tort law has been developed by impartial and generally conservative judges concerned with fairness to both sides as well as to society as a whole. As our society became more complex and industrialized, judges developed new doctrines to deal with these changes. But the changes in tort law were evolutionary, occurring over many years with new doctrines emerging only after long and careful thought. The doctrines now in place reflect this process and are, on the whole, fair and reasonable.

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[10] The Insurance Services Office (ISO) is the only organization that sets products liability insurance rates. "Ratemaking Report," p. 13. Although insurance companies are free to disregard th (a)-rates suggested by ISO, most companies use them. "Ratemaking Report," p. 38.

[11] According to a survey by ISO, 49.3 percent of all products liability claims are closed (paid or otherwise disposed of) within 42 months of occurrence. The remaining 50.7 percent of the claims are not closed until sometime after 42 months. "Ratemaking Report," p. 129. However, these percentages refer to the number of claims closed not the actual amounts paid out. Since small claims are usually disposed of faster than large claims, more than 50.7 percent of the total amount of money actually paid out is not paid until after 42 months. Thus, the existing system provides for a 42 month (at least) interest free loan from the manufacturer to the insurer for over one-half of the approximately 50 percent of premium representing anticipated claims.

[12] "Ratemaking Report," pp. 132–136.

[13] "Ratemaking Report," p. 136. Since insurers write casualty insurance on a 2 to 1 basis, that is for every $2 of premium there is $1 of equity behind it, the return on equity is actually twice the return on sales—43 percent using the example in the "Ratemaking Report."

[14] "Ratemaking Report," p. 140.

[15] H.R. Rep. No. 190, 97th Cong., 1st Sess. 4(1981).

Now, however, certain business interests, disenchanted with this long tradition in the American system of justice, are trying to change these doctrines. Having failed to convince impartial judges that an injured worker's or consumer's rights should be limited in particular ways, they have sought, first at the state level and now at the federal level, an audience in the political arena, an arena where, by virtue of their economic power, they hope to sway the opinions of those beholden to them for reelection. Judges with no stake in this controversy have rejected their arguments, politicians appear ready to accept them.

The support for a federal products liability bill among loyal followers of President Reagan also deserves some mention. We now have a President who campaigned on a promise to return to the states those powers that are rightfully theirs. Yet only those who use Federalism as a cloak for political expediency will argue that tort law is a legitimate federal concern. It is therefore our strong belief that tort law should be left to the state courts where detached and impartial deliberation has developed a system that gives those injured by defective products a fair chance to make their case.

Senator KASTEN. The next witness is Ms. Dolores Wallgren, of Washington, D.C.

Ms. Wallgren.

STATEMENT OF DOLORES WALLGREN, VICE PRESIDENT, DES ACTION

Ms. WALLGREN. Good morning, Senator. My name is Dolores Wallgren, and I am a DES mother and a vice president of DES Action, a national consumer group devoted to the concerns of the DES exposed. We are a nonprofit organization serving thousands of individuals through 32 offices across the United States. We have many concerns about the potential impact on consumers of product liability legislation.

But we would like to focus our attention today on one single issue, the requirement that an injured person must name the manufacturer in order to bring suit. In the case of most DES-exposed persons, such a requirement would effectively deny any right to redress for injuries.

In order to make this issue clear, I would briefly like to tell you a little bit about the history of DES and its effects. DES, or Diethylstilbestrol, is a synthetic estrogen which the FDA first approved for human use in the early 1940's. The FDA required pharmaceutical companies to use a standardized formula for the drug; thus, regardless of the manufacturer, the compound and its effects would be the same. From 1941 to 1971 DES was given to 3 million to 6 million pregnant women in the hope that it would prevent miscarriage.

In fact, as early as 1953 research proved conclusively that DES did not prevent miscarriage. But the FDA did not ban its use in pregnancy until 1971, when medical scientists discovered that DES was linked to a very rare form of vaginal cancer in the daughters of women who had taken the drug.

Today, we know that 6 million to 12 million DES-exposed mothers, daughters, and sons are at a significantly higher risk for cancer and reproductive problems. Some of these individuals need specialized treatment. All will need skilled monitoring on a continuing basis.

In addition to cancer, daughters face an increased risk of infertility, miscarriage, premature birth, stillbirths, and tubal pregnancies. Sons may face an increased chance of having fertility problems, abnormally small penises and testes, and testicular cancer. And finally, DES mothers may be at an increased risk for breast and other reproductive tract cancers.

I would like to tell you the story of one DES daughter, Joyce Bichler, who was a 17-year-old college freshman (probably the age of some of your daughters) when she started bleeding unexpectedly from her vagina. Frightened, away from home for the first time and not knowing what to do, she was seen by doctor after doctor and finally received a diagnosis—the rare form of cancer of the vagina and cervix called adenocarcinome. The cervix, of course, is the mouth of the womb.

Within a few months she had radical surgery which removed her uterus, one ovary, and two-thirds of her vagina. At age 18 Joyce was stripped not only of the possibility of ever bearing a child, but saddled with emotional and physical effects of which she has described as "mutilating surgery," and a constant fear of the cancer's recurrence.

Joyce knew she was exposed to DES in her mother's womb, but she could not prove who the manufacturer was. And Joyce's case is typical of many DES victims. First, since injuries do not become manifest until decades after exposure, it is difficult to track down medical records. In many cases, obstetricians have died or have closed their offices.

Furthermore, DES was a standardized compound sold under many brand names. Thus, even if medical records can be located and show a prescription for DES, that prescription could have been filled by any of more than 200 brands that the pharmacist might have had on the shelf.

Since no State requires pharmacists to keep records for 20 or 30 years, it is unlikely that DES victims will be able to verify the manufacturer of the harmful drug to which they were exposed.

The question we must address today is whether or not Joyce and other DES victims should have the right to sue. Should victims have to bear the financial and emotional cost of injuries solely because, through no fault of their own, they cannot identify the particular manufacturer of a harmful product in general use?

Should the manufacturer of a harmful product be exempt from liability just because other manufacturers made an identical product? It is imperative that all consumers maintain the right to bring such injuries to court and let juries decide whether compensation is warranted.

Senator KASTEN. The next witness is Prof. John Fleming, California Manufacturers Association, University of California School of Law.

Prof. John Fleming.

STATEMENT OF JOHN FLEMING, PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA SCHOOL OF LAW, REPRESENTING THE INDUSTRIAL LIABILITY COUNCIL OF THE CALIFORNIA MANUFACTURERS ASSOCIATION

Mr. FLEMING. I thank you for the opportunity of addressing you. I speak here for the industrial liability council of the California

Manufacturers Association. I have been in the field of teaching torts for upward of 20 years at Berkeley. It is my field of study. I am the author of a work that is now going into its sixth edition, a textbook on torts. I have also been involved in the litigation that led to the *Sindell* case.

I understand that this is not an occasion for going into the DES matter. But with me there is Mr. Marshall Simonds of the firm of Goodwin, Procter & Hoar, who is a prominent litigator in this field and who is available for questions.

I also understand that a statement is available and can be submitted with regard to factual matters pertaining to the DES situation.

But I would like to address myself to the larger issues that are raised by this bill than DES.

I would support this bill as striking a suitable balance within the framework of the tort system between reasonable consumer protection and what the industry can afford.

Such a balance is a perennial problem of tort law. As industry has grown, so has the ability of tort law to provide increasing protection.

Yet I have noticed a fundamental error in the approach by some of the witnesses who have been speaking on the other side. There used to a saying familiar to all lawyers: Where there is a wrong, there should be a remedy.

What these witnesses assume, however, is that whenever there is an injury, there should be a remedy. Perhaps there should, but it is not for the system of tort law to provide it, because it is incapable of doing it. It is overtaxing the capacity of that system. We have heard witnesses to this effect, and I do not want to retrace those stories.

I come from a State in which many of us believe the system has been distorted to the point of imposing burdens in transaction costs and in the cost to industry that are unbearable. And that is due to the fact that our court, with all due respect—and I think this is a view shared by many lawyers, certainly by most academics, and, I might say, also by most of the State courts in the country—that our court has been unwilling to count costs in seeking to transform the tort system into a system of accident compensation.

There may be arguments for having a system of accident compensation, but this obviously is not the way, particularly when, as is quite obvious, it involves such huge transaction costs—they have been mentioned—because of the very high costs of the transactors and the fact that the damages awarded often vastly exceed what is necessary to compensate the individual victim.

Now, I might just mention two or three examples of where I believe the California court—isolated, I believe—has gone too far. One is with regard to design defects, where it has now laid down that once a plaintiff can establish that his injury has been caused by a feature of the product, it is up to the defendant to show that it was not defective within the meaning of the law.

So, in other words, we have got already the burden of proof shifted to the defendant. That is quite extraordinary. The court has not committed itself but is also looking toward a hindsight test; in other words, determining defectiveness not by the time the product is marketed, but in the light of knowledge, feasibility, et cetera, of today.

The last of these horribles is to exempt plaintiffs from identifying the source of the injury. The *Sindell* case dealt with DES, but obviously the problem goes much further. For example, it is applicable to asbestos, food preservatives, weed killers, tobacco, the aluminum wire case which was tried in Kentucky as a result of that terrible fire at the Beverly Hotel where the court refused to apply *Sindell*, flammable plastics. In other words, it covers a vast range of products.

This bill seeks to return the law where it should be and where most of the State courts that have dealt with this matter believe that it is. No State in the United States has followed *Sindell*. Indeed, the California court itself was conscious of the fact that the existing precedents did not permit that conclusion. It was doing a radical transformation. And I submit this bill is correct in seeking to return to the need for identification of the producer. Thank you.

[The statement follows:]

STATEMENT OF JOHN FLEMING, PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA SCHOOL OF LAW

Good morning Mr. Chairman and members of the Consumer Subcommittee. I am Professor John Fleming of the University of California at Berkeley School of Law. I am here today on behalf of the Industrial Liability Council of the California Manufacturers Association.

IS NATIONAL LEGISLATION ON PRODUCTS LIABILITY NECESSARY

Products liability is a judicial development of the law of torts which has been traditionally State law. But products, especially manufactured products, are nowadays distributed over a national market. Manufacturers therefore have a legitimate interest in a uniform and predictable standard of public responsibility, as have insurance carriers who underwrite the industry's liability risk. If the law of one state is more favorable to a plaintiff than that of others, not only will he attempt to take advantage of it ("forum shopping"), but the law of that state will also in practice set a nationwide standard for manufacturers who cannot ordinarily predict where a particular product will in fact enter the market. This tends to increase unfairly the burden on industry which has become hostage to the vagaries of a deviant state court. National uniformity of products liability, at least on critical points, is therefore desirable in the interest of an orderly system of interstate commerce and efficient resource allocation.

PURPOSES OF THE BILL

It is not the purpose of the bill to turn the clock back on the improvement in consumer protection which accompanied the introduction of strict liability in the 60s. The principal inadequacy of negligence as the traditional test of liability was the perceived unfairness in requiring the injured consumer to prove specific acts of negligence in proving construction defects or manufacturing defects where the defendant, generally, was in a much better position to know what had gone wrong. (Traynor J. in *Escola* v. *Coca-Cola Bottling Co.* (1944) 24 Cal. 2d 453). Besides, throwing the risk on the producer would add an incentive to accident prevention and promote allocative efficiency. The Staff Draft adheres to this decision.

Subsequent developments have pushed strict products liability far beyond these original aims. The most critical of these concerns the extension from construction to design defects. In the former case, something has gone wrong in the process of manufacture, such as a missing bolt in a steering linkage of an automobile. Such occurrences simply must not happen, and it is no great challenge to conclude that the particular product was "defective" since it did not conform to the manufacturer's own specifications. In the case of design defects, however, an attack is made on a whole production line. The most intractable problem is how to fix the minimum standard of safety to which the design ought to conform. Here the manufacturer's own specifications obviously cannot provide the test, for they are the very target of attack. Various tests have been suggested but no consensus has emerged from judicial efforts over two decades. In so far as the inquiry invites a judicial hindsight evaluation by nonexperts (judge and jury) of an informed managerial decision, the problem in the view of some observers overtaxes altogether the judicial process. In any event, it would seem imperative to try to improve the process of courtroom decision by (1) refining the appropriate definition of "products unreasonably unsafe in design", (2) giving appropriate weight to conformity of the product to governmental, administrative or industry standards, and (3) requiring that the product meet the standards prevailing when it was marketed rather than by reference to later discoveries.

I will confine my remarks to the last two aspects.

CONFORMITY TO GOVERNMENTAL STANDARDS

If a product conforms to a government standard with regard to an aspect that caused the injury, it should be considered safe enough. In the first place, it is invidious to subject the decision of experts, to whom the formulation of standards has been officially delegated, to second-guessing by the inexpert man-in-the-street who sits on juries. Secondly, it provides an assurance to the manufacturer that it is safe to go ahead with production without incurring the risk of protracted litigation and possible liability.

When in addition to formulating standards, the governmental agency subjects the product to a process of comprehensive testing for safety before licensing it, the argument for treating a licensed conforming product as "safe" becomes even stronger. This is the situation with regard to pharmaceutical products which have passed the double test by the FDA of being both safe and effective. The attack on particular drugs for subsequently discovered harmful side effects which were unknown and, in the light of prevailing technical and scientific knowhow, unknowable, imposes on industry (and therewith on the general consumer) a burden that is at once unfair and intolerable. It tends to discourage the development of new and potentially highly beneficial drugs or to lead to over-investment in precautions. Not only the cost of meeting adverse judgments but the cost of just defending claims, even unsuccessful claims, has given rise to justified alarm. The Swine Flu affair brought this all too clearly to public attention. Accident deterrence is an important function of legal sanctions, but over-deterrence can be as harmful to society's welfare as under-deterrence. The FDA is the consumers' watchdog, itself sometimes rebuked for over-caution and resulting delay in licensing drugs. To heap the spectre of legal liability on the manufacturer is an expensive overkill.

HINDSIGHT, "ENTERPRISE" LIABILITY

Most of the case law does not demand more than that the product be safe in the light of technology and knowledge of risks prevailing at the time the product was marketed. In other words, a product cannot be condemned merely on the basis of hindsight. If the purpose of the liability rule is to encourage investment in safety, no more could be asked for than what was practicable at the time, no later. To allocate so-called development risks, i.e., unknowable risks, to the producer would convert product liability into an insurance system. Such liability is practically uninsurable in the private market. If deemed necessary as a matter of social policy, other options should be considered, one of which may be some form of a statutory system of compensation with limited benefits, as in Germany, Sweden, and Japan. The present bill rejects the hindsight test and would forestall judicial adventurism into insupportable extensions of liability.

That a few courts have not shrunk from toying with theories of "enterprise liability" i.e., let the producer pay for any accident, is illustrated by the decision of the California court that a person claiming to be injured by a fungible product need no longer identify the particular producer but may make any producer of such a product liable proportionately to its market share. (*Sindell* v. *Abbott Laboratories*, 1980, 26 Cal. 3rd 588). this decision clearly crosses the border from individual responsibility, the traditional basis of tort, to collective responsibility of a whole industry.

The "market share" theory is both unworkable and imposes transaction costs that will substantially increase the diversion of available resources to those least deserving, namely attorneys. It is unworkable because it invites prolix arguments about what is the relevant market, what is the market share of individual defendants, besides subjecting producers who have been actually identified, perhaps even repeatedly, to further liability for their market share. Nor does it make any allowance for the unequal legal costs of defending multiple claims. The doctrine substantially increases transaction costs because of the innumerable cross-claims it spawns between different producers. The judicial system is not equipped to handle such massive litigation.

CONCLUSION

The present bill seeks to keep products liability within the bounds of our society's capacity to assure reasonable protection for the consumer at a cost that will not be ruinous to industry or burden the whole consumer public with an intolerable tariff. Over time the traditional tort system has grown and expanded in response to increasing public expectations of protection and within the increasing capacity of industry and insurance. But the balance is a fine one and if unduly tilted can have drastic effects on the well-being of our economy. This bill seeks to maintain that balance.

Senator **Kasten**. Thank you, Professor Fleming. And we are out of time. But there will be questions for all of you that we will submit.

Professor, how can equity be done when someone is clearly injured by a product but cannot identify the specific manufacturer of the product? In other words, is there an alternate system to solve Mrs. Wallgren's obvious problem?

Mr. **Fleming**. Mr. Chairman, there are other alternatives, and some have been tried. Many of the people who suffer injuries do not incur medical costs at all. They are entitled to first-party insurance or prepaid medical treatment. Under the tort system, the so-called collateral source rule requires that they be ignored. Consequently, in a great number of cases there are no losses of income at all and the medical costs are in fact taken care of.

One can have compensation systems, and invariably throughout the world where they are being tried out, they have to be related to the capacity of the industry and of society to bear the cost. That implies limitations of liability, making the compensation fund secondarily liable; in other words, allocating primary liability to the collateral sources, such as first-party insurance, so that the compensation fund is merely required to meet the difference.

Such compensation funds can be set up. That is a legislative task. I mentioned the possibilities. But there is always the issue of, how far shall it go? Should it cover only drug victims? Should it cover the victims of all defective products? If of defective products, why not others? Should we have an accident compensation system such as exists in New Zealand and abolishing all tort liability?

These are difficult questions. They cannot be resolved by the courts, they can only be resolved by legislation.

Senator **Kasten**. I would like to make one comment to both of you and to the audience. We are happy to hear the testimony on DES this morning. However, the focus of these hearings is really on the need for Federal legislation on product liability and not on specific content. But because this particular area is such a real problem, I thought it would be helpful to at least include some of this discussion and some of this testimony in the hearing record.

Professor Fleming, would you comment on the remarks of some of the earlier witnesses? And could you comment further on your sense that some of the California court decisions seemed to go further than possibly one might expect.

Is this problem getting worse or getting better? Is the frequency and number of lawsuits increasing or decreasing? And what is the situation regarding business insurance? Is it easier or harder to get insurance? Are the premiums relatively higher or relatively lower?

Mr. **Fleming**. Well, now it takes between 5 and 7 years in order to get a case tried in Los Angeles, if that is an indication of what is happening as a result of it.

The situation is getting consistently worse because our courts are also manipulating the conflict rules. California law is held applicable, not only where there are injuries in California but when anybody can sue California manufacturers.

One of the most egregious cases, I think, one can possibly imagine is one that arose out of the Turkish airline disaster, where very few, if any, Americans were involved. Most of the passengers had no relation at all with the United States. But the court held that California law should be applicable in order to punish the manufacturers who were located in California.

Consequently, just to give one example in one case—these were, of course, all death cases—where the relevant husband and wife were English and had never been in the United States, it was the view of a British counsel that under the English Wrongful Death Act the parents were entitled to something like $5,000.

In Britain, as in many jurisdictions, there is no recovery in wrongful death cases for nonpecuniary loss. But in the Los Angeles proceedings a jury was convened in order to set an award and therefore to guide the judge in helping the settlement process. The jury made an award of upwards of $1.5 million.

These people, as I said, had no connection with the United States at all. It was pure punishment.

Senator **Kasten**. I would like to thank the four of you on behalf of the Consumer Subcommittee. I would also like to take this time to thank all of the witnesses who have appeared today. I found the testimony presented to be highly informative and helpful in clarifying several of the many complex issues involved.

I look forward to the continuation of this hearing this coming Friday, March 12, beginning at 9.30 in this same room. At that time the subcommittee will hear testimony from Secretary of Commerce Malcolm Baldrige.

Once again, let me say thank you to those of you who testified. Your contributions are most appreciated.

[Whereupon, at 12 noon, the subcommittee adjourned, to reconvene at 9.30 a.m. on Friday, March 12, 1982.]

[The following information was subsequently received for the record:]

STATEMENT OF MARSHALL SIMONDS

My name is Marshall Simonds. I am an attorney in private practice with the firm of Goodwin, Procter & Hoar in Boston Massachusetts, and have been engaged in the defense of product liability litigation involving DES for the past seven years. At the request of five pharmaceutical companies frequently named as defendants in DES litigation across the country, I attended the hearing of the Senate Consumer Subcommittee on March 9, 1982. Those companies are Abbott, Eli Lilly, Rexall, Squibb and Upjohn.

As Professor John Fleming explained in his testimony to the Subcommittee, my purpose in attending the hearing was to respond to any questions the Subcommittee might have pertaining to DES litigation. Because of time constraints, there was no opportunity during the hearing to do so.

In view of the testimony offered at the hearing by Dolores Walgren of DES Action, a number of important factual questions about DES may have gone unanswered. Her testimony contained a number of errors concerning (1) the history of DES, (2) the effects of DES on those who took it or were exposed to it, and (3) the impact in DES cases of the traditional rule that the claimant in a product liability case identify the manufacturer of the product which caused the harm. This memorandum addresses each issue and clarifies some of the statements made by Ms. Walgren.

I. HISTORY OF DES AND ITS USES

Facts

Natural hormones, including estrogen, were first identified in the 1920's. DES is a synthetic estrogen, first developed in England in 1937. The medical community greeted the discovery of this synthetic estrogen with enthusiasm for several reasons. The natural estrogen with which the medical community had been working for a decade was in short supply, extremely expensive and was not effective unless it was administered by a painful intramuscular injection. Extensive testing indicated that the new synthetic estrogen produced the same physiologic action as the natural estrogen. It was readily available at a tiny fraction of the cost of the natural estrogen and was effective when administered orally.

The first uses for which DES was studied and investigated had nothing to do with pregnancy. In 1941, after the largest clinical trials in the history of the Food and Drug Administration (FDA), the FDA approved DES for a variety of uses primarily related to the treatment of various symptoms and conditions associated with the manopause. By 1944 the FDA had extended the approved uses of DES to include the treatment of prostate cancer in men and, in certain circumstances, breast cancer in women.

The first approval for use of DES in the treatment of certain problems in pregnancy did not occur until 1947. By that time there had been almost a decade of study by distinguished independent physicians and scientists in the use of DES to assist women with certain kinds of problems during pregnancy in avoiding miscarriage. The research showed that in a normal pregnancy the natural estrogen levels rise dramatically and stimulate the placenta to produce progesterone, which is essential to maintain pregnancy. In some problem pregnancies, the estrogen and progestrone levels may be too low to support the pregnancy, and thus, without treatment, miscarriage is likely. Initially, the researching physicians treated this problem by injections of natural estrogen. When DES became available and was found to act like the natural estrogen, the physicians used DES to treat these problem pregnancies. The results of their studies showed that DES saved babies' lives.

These studies showed that, for example, in a group of 478 pregnant diabetic women with abnormal estrogen levels, the 380 who received DES treatment had a significantly higher rate of successful pregnancy than the 98 who received no treatment. Ninety percent of the treated women as compared to 52 percent of the untreated women carried the pregnancy to term. Other studies showed that in the case of women who had two previous miscarriages, DES treatment increased the chance of a successful third pregnancy from 62 percent to 81 percent. Where there were three previous miscarriages, DES increased the chance of a successful fourth pregnancy from about 20 percent to 87 percent. Where there were five previous miscarriages, the chance of a successful pregnancy increased from zero percent to 20 percent with DES.

When the FDA approved DES as a miscarriage preventive agent, identical chemical standards were required for the active ingredient. Manufacturers were free to incorporate that active ingredient into any formulation of DES. Thus, the DES manufactured and distributed by the over 300 companies involved in the United States between 1947 and 1971 was not in every respect identical. For example, the drug was formulated in tablet, coated tablet, suppository, injectable and elastic capsule forms, and at least one pharmaceutical company combined DES with vitamins. In addition to different product forms, there were variations among products in color, size, shape, dosage strength and inactive ingredients such as binders.

By 1952, the FDA reclassified DES as no longer a "new drug," indicating that experts in the field recognized that DES was safe.

In 1971, the FDA directed DES manufacturers to contra-indicate DES for use by pregnant women, *i.e.*, to say that DES should not be used by pregnant women. That directive was the result of a report by Drs. Arthur Herbst and Howard Ulfelder, suggesting a statistical association between ingestion of DES by pregnant women and a rare form of gynecologic cancer in their daughters. The statistical association was based solely on retrospective review of medical records. While the data suggesting a statistical association still exists, after a decade of intense study no cause and effect relationship between the ingestion of DES by the mothers and cancer in the offspring has ever been scientifically established. Dr. Herbst himself has stated that no cause and effect relationship has been established. "Developmental Effects of Diethylstilbestrol (DES) In Pregnancy," Herbst & Bern (1980). (See discussion, II).

DES continues to be used today for a number of medical problems such as breast cancer, prostate cancer, atrophic vaginitis, female hypogonadism, primary ovarian failure and treatment of menopausal symptoms.

Factual inaccuracies in the testimony of DES action

DES Action: "The FDA required pharmaceutical companies to use a standardized formula for the drug; thus, regardless of the manufacturer, the compound and its effects would be the same."

Answer: While a standard formula for the active ingredient was mandated, companies were free to and did use different formulations for DES. The actual effect of these different formulations are unknown. They may have affected the impact of the drug and its effects.

DES Action: "[A]s early as 1953 research showed conclusively that DES did not prevent miscarriage."

Answer: A study in 1953 by Dr. W. S. Dieckmann of the University of Chicago disagreed with leading medical authorities in the field by stating that DES was *not* effective in preventing complications of pregnancy. This study, however, focused on the prophylactic use of DES in the general population of pregnant women. DES was recommended and used for treatment of certain complications of pregnancy, such as threatened and habitual abortion, which typically occur during the first trimester of a pregnancy. Because the Dieckmann study did not seek to study the very women for whom DES was recommended, the results of that study simply do not support the conclusion that DES was ineffective.

II. EFFECTS OF DES

Facts

As explained above, DES was used successfully to prevent miscarriage in certain problem pregnancies. The Herbst report in 1971 noted that of the eight women examined, who had a very rare form of genital tract cancer known as clear-cell adenocarcinoma, seven were daughters of women who had taken DES. Herbst concluded that DES might be a risk factor.

Research in the decade since that study both by Dr. Herbst and other leading experts in the field has failed to establish a cause and effect relationship between ingestion of DES by the mothers and cancer in the daughters. Herbst set up a worldwide registry of women with clear-cell adenocarcinoma in 1972. As of October 1980, the registry showed less than 425 such cancer cases, only two-thirds of whom are DES daughters. Assuming, as DES Action does, that 3 to 6 million mothers took DES and that 1.5 to 3 million daughters were exposed *in utero* to DES, the statistical relationship between DES and clear-cell adenocarcinoma may be as low as 1.4 in 10,000. (Note: There are about 100,000 new cases of breast cancer each year. Breast cancer occurs in the general female population at a rate of 1 in 10.)

In the most recent DESAD study report (the largest such study yet completed), 22 percent of DES daughters were diagnosed as having vaginal epithelial changes, including adenosis, a benign, non-cancerous condition. In contrast, 12 percent of unexposed women in the same study were diagnosed as having vaginal epithelial changes, such as adenosis. Adenosis is the presence of normal cells in an unusual location in the vagina. It is not precancerous. It requires no medical or surgical therapy. It is a self-limiting condition which nearly always disappears when the women reach their late twenties.

The best medical evidence to date indicates that DES sons do not have any increased risk of genital tract abnormalities. A 1977 study did suggest that the number of benign anatomical abnormalities may be higher in DES-exposed sons than in non-exposed sons. However, a later study contradicted the 1977 study and demonstrated that there was no increased risk of genital tract abnormalities. Further, there has never been any evidence of an increased risk of cancer.

Factual inaccuracies in the testimony of DES action

DES Action: "In addition to cancer, daughters face an increased risk of infertility, miscarriage, premature births, stillbirths, and tubal pregnancies."

Answer: Clear-cell adenocarcinoma is extremely rare. Herbst and others suggest that the statistical range is from 1.4 in 1,000 to 1.4 in 10,000. While there are some studies showing increased risks of premature births or miscarriages among DES daughters, the number of subjects studied to date is few. There is no statistically significant increase in infertility or ectopic pregnancies among DES daughters when compared to the normal population.

DES Action: "Sons may face an increased chance of having fertility problems, abnormally small penises and testes, and testicular cancer."

Answer: The best scientific evidence shows that DES sons do not have an increased incidence of genital tract abnormalities. With regard to fertility problems and cancer, there is no scientific evidence supporting the statement.

DES Action: "DES mothers may be at increased risk for breast and other reproductive tract cancers."

Answer: Again, there is no evidence linking DES to such conditions in the women who took DES to prevent miscarriage.

III. IMPACT OF TRADITIONAL RULE THAT CLAIMANTS IDENTIFY THE MANUFACTURER

Facts

It is a basic principle of product liability law, indeed of all tort law, that the claimant must prove that the defendant caused the injury. For over 200 years, courts have required a factual, causal connection between the defendant's manufacture or sale of a product and the claimant's injury. This causation requirement recognizes that a person should be responsible for harms only if he caused the harm or could have prevented the harm. One who in no way contributed to the wrong alleged by the claimant should not be held responsible.

In *Sindell* v. *Abbott Laboratories,*[1] a case brought by a DES-exposed daughter, the California Supreme Court departed from this traditional rule. In a 4 to 3 decision, the court permitted the case to go forward even though the claimant alleged she could not identify the company which made the DES which caused her harm. Looking to a student law review note, the court developed a radical "market share" theory under which the claimant was permitted to forego the causation requirement and to sue, instead, a "substantial share" of the market. The court made no finding that any manufacturer was at fault: this matter was left to the trial court to determine in the future and is currently in litigation.

Under the *Sindell* theory, two incorrect assumptions are made. First, it is assumed that the defendants comprising a substantial share of the market caused the harm. Each defendant must prove that it did not cause the harm or, if it cannot so vindicate itself, it must pay a portion of the claimant's award equal to its share of the relevant market. Second, it is assumed that such sharing of liability will, in the long run, approximate the total liability of each defendant.

With regard to the first assumption, even if fault or causation on the part of one manufacturer could be established, it is not correct to assume that *all* manufacturers or sellers of a particular generic product are at fault where there is no proof to that effect. Where there is no joint action among them, it is unfair to assume fault industrywide. Different manufacturers may well have marketed the product at different times, under different circumstances, with different warnings or labels, perhaps banning the product for the use which caused the claimant's harm.

With regard to the second assumption that the "market share" theory fairly approximates a manufacturer's total liability, this is true only if all manufacturers were at fault and if the percentage of the market and, thus, the percentage of total liability, is accurately determined in every case. Because there are substantial uncertainties in determining market share, this assumption is not valid. Some claimants will not use the market share theory because they can, in fact, identify the maker of the product. Those that do have no guidance from *Sindell* about whether the relevant geographic market is local or national and whether the relevant product market is confined to the product as it was used by the claimant. Given the lack of guidance, the determination of market share will vary from case to case, destroying the accuracy anticipated by *Sindell.* More importantly, the ability to prove the relevant market will vary, depending on the records kept by the defendants and others in the market. Proof problems are made more difficult with the passage of time. Reconstructing market shares will involve massive litigation and relitigation with no assurances of accuracy.

The result, then, is unfair. It assigns responsibility for harms without regard to causation or fault. In effect, the result replaces the traditional principle of individual responsibility for harms with a form of compensation system, requiring manufacturers to pay for harms done by others. The tort litigation system is an inappropriate and inefficient method of adopting such a compensation system, if that is what is desired. Courts, operating under very general guidelines, are inappropriate vehicles for determining market share. Claims, of course, will go unpaid during the decades of litigation which will be involved.

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[1] 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied,* 449 U.S. 912 (1980).

DES Action apparently suggests going one step beyond *Sindell.* It would eliminate proof of causation and identification of the defendant, and would not require suing a substantial share of the market. This would distort tort law even further and, like *Sindell,* is unfair.

No high court of any other state has, to date, followed *Sindell.* Many courts have explicitly rejected it. Nevertheless, the opinion has had an adverse impact on interstate commerce. Manufacturers, when they can obtain insurance, must do so on the theory that a suit may be brought in California or in a state which elects to adopt *Sindell.* Consumers pay higher product prices as a result.

To assert that the traditional causation requirement leaves injured claimants without a remedy is, once again, a gross exaggeration. While there is no doubt that in a number of the DES cases, identification of the manufacturer will not be possible because of the passage of time from exposure to manifestation of harm, experience has shown that in a substantial number of the cases it is possible. Given discovery from defendants, access to records and individuals which only the claimant knows or can identify (pharmacy and medical records), and access to his or her own recollections, the claimant is often in a position to prove the responsible defendant. To allow the claimant to avoid this element of his or her case in litigation, as DES Action proposes, would lead to more uncertainty and unfairness for all parties, including the claimant and the consuming public. The defendant is in a far less advantageous position than the plaintiff to prove, first, if any DES was ingested and secondly, who manufactured that DES.

The traditional causation requirement, incorporated in the Senate Staff Working Draft No. 2, should be maintained not only because it fairly places responsibility for harm at the door of the party which causes the harm, but also because it is the only workable approach to product liability tort law. The "market share" theory is incompatible with our system of litigation. It is a form of risk-distribution, insurance compensation which, if preferred, cannot be efficiently and fairly accomplished within the tort system. The Staff Draft and the courts should preserve the rule and the tort litigation system.

Inaccuracies by DES action regarding the Sindell Theory

DES Action: "In the case of most DES exposed persons such a requirement would effectively deny any right to redress for injuries."

Answer: Once again, Ms. Walgren has overstated the facts. There is no doubt that because of the lapse of time between the ingestion of the drug by mothers and the claims for injury by the offspring, there are in many instances real difficulties in identifying the manufacturer of the particular drug a mother ingested. On the other hand, in a significant percentage of the hundreds of cases now pending, identification of the manufacturer has been established. In a number of other cases it seems clear that adequate investigation would have permitted identification. The point is not that identification will always be possible. In many cases, the evidence on which such identification could be based has simply been lost. The point is rather that Ms. Walgren's testimony has greatly exaggerated the scope of the problem and that her proposed remedy, the elimination of the manufacturer identification requirement, will create vastly more serious problems than it will solve, not merely in the case of the DES litigation, but in the case of a multitude of other products as well. Even if such proof is impossible, that circumstance does not warrant the abolition of a rule which has a sound rationale and public policy basis. On its face, the market share theory discourages plaintiffs from actually pursuing the identity of the specific manufacturer of DES involved in a given case.

DES Action: "The question * * * is whether or not * * * DES victims should have the right to sue."

Answer: That is, in fact, *not* the question raised by DES Action. The statement is an incorrect evaluation of the issue. The issue is whether claimants, allegedly harmed by a product, should recover from *any* manufacturer regardless of whether that manufacturer was at fault and regardless of whether that manufacturer in any way caused the harm.

DES daughters do and should have the right to sue. However, that right should not permit them to sue and recover from *any* manufacturer without proof that it caused the harm.

DES Action: "Should victims have to bear the financial and emotional costs of injuries solely because, through no fault of their own, they cannot identify the particular manufacturer of a harmful product in general use?"

Answer: First, as previously noted, DES is not a harmful product. But assuming for purposes of this question that it is, under the traditional tort litigation system, the answer is yes. Without such proof, the tort system is not the proper mechanism to allocate responsibility for harm. That system is founded on the principle of individual responsibility for harms, and it is not a compensation system, as DES Action seems to imply.

DES Action: "Should the manufacturer of a harmful product be exempt from liability just because other manufacturers made an identical product?"

Answer: No. That is not the effect of the traditional causation requirement. Liability should be assigned to the manufacturer which caused the harm, even where others made a similar product. If proof of the manufacturer's identity is not possible, however, should *any* manufacturer of the *class* of product be held wholly or even partially responsible for the harm, where there is no proof that it was at fault in any respect? This converse of the statement by DES Action is not fair—should the manufacturer of a product be held liable just because others made an identical product which may be harmful?

PRODUCT LIABILITY REFORM

FRIDAY, MARCH 12, 1982

U.S. Senate,
Committee on Commerce, Science, and Transportation,
Subcommittee for Consumers,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:45 a.m., in room 235, Russell Senate Office Building, Hon. Bob Kasten (chairman of the subcommittee) presiding.

OPENING STATEMENT BY SENATOR KASTEN

Senator **Kasten**. Good morning. I am pleased to welcome all of you to the second day of hearings on the need for Federal uniform product liability law. Today, we are particularly pleased to have present the Honorable Malcolm Baldrige, Secretary of Commerce, as well as representatives from the legal community, individual businesses and a number of other consumer product seller organizations.

I think it is particularly appropriate we have with us today Malcolm Baldrige, the Secretary of Commerce, a former businessman, and a person who is doing a marvelous job representing this administration and addressing the need for jobs and employment in this country today.

So, Mr. Secretary, it is a great privilege to have you appearing before our committee this morning. I know that you have a meeting with the President in just a few moments and that you are only going to be able to be with us for a short time, but we very much appreciate your time and look forward to your statement.

STATEMENT OF HON. MALCOLM BALDRIGE, SECRETARY OF COMMERCE

Secretary **Baldrige**. Thank you, Senator. I believe this committee is performing a very important service in drawing attention to the economic problems created by recent developments in product liability to the law and in considering possible solutions to those problems.

During my confirmation hearings, Mr. Chairman, I indicated that, in my view, it would be worthwhile at some point to look into whether there is a need for Federal legislation relating to product liability law. I noted that some aspects of current State law in the area of product liability may have had a dampening effect on the development of new products, and on productivity generally.

I recognize that any consideration by this committee of State product liability law must address the tensions that lie between the traditional State-by-State approach to product liability law and the modern economic reality of nationwide markets. The committee will also have to address the tensions that lie between the evolutionary nature of the common law as implemented largely by juries in product liability cases, and the increased certainty offered by legislation, whether it be State or Federal.

This administration is committed to the concept of federalism. We feel that in order to be successful, any legislation must be consistent with that concept. This administration is seeking to reduce the burdens of the Federal regulatory apparatus and dismantle that which is counterproductive or unduly impinges on State sovereignty. Except where outweighed by pressing national needs, this means leaving States free to adopt their own standards to be enforced by State officials in the State courts.

I am not today endorsing any piece of Federal legislation or suggesting the need for any particular Federal legislative approach. I am, however, prepared to commit the administration to working with this committee and others in Congress toward a balanced analysis of the issue.

Recent developments in product liability law appear to raise not one underlying issue but several. One is inconsistent liability standards among the States. Another is conflicts between State liability standards and Federal regulatory requirements. Yet another is the development of expansive new liability doctrines by some State courts which affect product design, manufacture, and marketing throughout the Nation.

Any Federal response must distinguish carefully among these concerns. Any Federal legislation must also pay appropriate deference to State sovereignty and the traditions of common law, respecting the legal rights and obligations of both consumers and producers.

Under present legal arrangements, an individual State cannot protect its manufacturers from the costs and uncertainties created by product liability laws of other States. At the same time, a State that restricts the ability of its own citizens to recover from out-of-State manufacturers only places its citizens at a disadvantage compared to those in other States with little corresponding gain for local manufacturers.

It is for these reasons that some form of Federal response has been suggested as an appropriate exercise of our constitutional responsibility to protect interstate commerce.

I know that other witnesses will be addressing the types of problems they are encountering. I would like to summarize for the committee the previous efforts the Department of Commerce has taken in this area.

The Department has devoted considerable time and effort to studying product liability law and its operation throughout the 50 States.

In 1976, President Ford asked the Department to chair an interagency task force whose mission was to review widespread complaints within the business community concerning rapidly rising costs of securing insurance. The task force completed its work in

November 1977, and published an extensive final report containing its findings. Some of these findings many be of interest to the committee:

First, product liability premiums had increased substantially for manufacturers of industrial equipment, industrial chemicals and heavy castings, as well as pharmaceuticals, medical devices and other high-risk consumer products. This was true even for some individual companies which had experienced no product liability claims.

Second, the impact of premium increases had been greater for small businessmen than for large business.

Third, increasing premiums had caused some smaller firms to discontinue certain product lines, and others to forego development of new products. I have seen that firsthand, Mr. Chairman.

Among the principal causes identified by the task force of the incidence of rising insurance premiums were: (1) overly subjective ratemaking practices within the insurance industry, and (2) uncertainties in the tort litigation system brought about in part by a lack of uniformity among the States as to the legal standard for product liability which would be applied. I think significant progress has been made in dealing with the problem of subjective ratemaking practices. Following publication of the task force's report, the Department conducted an exhaustive study of insurance ratemaking practices nationwide.

The report Commerce issued made recommendations for consideration by State legislatures, State insurance commissioners and insurers themselves. These recommendations largely involved the kinds of data that should be collected and how basic insurance rates could be determined by analyzing this data. By and large, these recommendations have not been implemented.

The Department has also been active in the 4-year effort to enact legislation which would provide additional incentives toward objective competitive ratemaking practices. The Risk Retention Act of 1981 will, we are confident, will be effective in solving a major problem in securing adequate and affordable insurance.

I should point out that the Risk Retention Act preempts State laws only to the extent necessary to carryout its purposes. No Federal chartering is provided; an insurance charter must be obtained from a State, Bermuda or the Cayman Islands; nonchartering States are free to collect premium taxes on a nondiscriminatory basis and impose key regulations designed to protect consumers. On the other hand, multiple capitalization requirements and other regulations that impede forming interstate self-insurance groups are preempted.

In the same vein, we supported legislation, since enacted, amending the Internal Revenue Code to expand the carryback period for net operating losses resulting from product liability claims from 3 to 10 years.

Reduction in the uncertainties of the tort litigation system has been more difficult to accomplish.

One outgrowth of the Department's task force work was a recommendation that the Department prepare a uniform product liability law. After 3 years, during which the Department received extensive comments and conducted four major consumer conferences, the Uniform Product Liability Act was published in 1979 as a model for State action.

Although the Uniform Product Liability Act has won endorsement from many business groups, insurers, and individual State legislators, it has been partially adopted in only four States: Connecticut, Washington, Idaho, and Kansas. No State has adopted it totally; 31 other States have adopted some form of product liability legislation over the years, but this legislation has varied from State to State.

These differences in State law have certainly not eased the uncertainty among product sellers, insurers and consumers. For example, some States require a manufacturer to warn about obvious dangers associated with the use of his product; other States do not. Most State courts exclude evidence of improvements in product safety in order to encourage safety innovation, but two State court systems now admit such evidence. Such uncertainty contributes to legal costs which exceed the amount consumers obtain in judgments. Insurance data show that for every 66 cents, a plaintiff receives in judgments, 77 cents is spent for lawyers. These costs, of course, are ultimately paid by the consumers themselves.

We are convinced that this is a matter deserving the most serious attention, and I, this week, have placed the product liability question on the agenda of the Cabinet Council on Commerce and Trade, of which I am the chairman pro tem. The Council will be considering the various problems discussed in my testimony this morning, and the various proposals that have been made for addressing them at an early date.

I look forward to continuing to work with you, Mr. Chairman, and this committee as you consider specific legislative responses to a significant problem.

Thank you, Mr. Chairman.

Senator KASTEN. Mr. Secretary, thank you very much for your statement. As you know, I, too, am concerned about the current state of the law in the area of product liability. It is a significant problem and I am particularly interested that you pointed out the patchwork nature of the State-by-State approach.

I guess ideally, we would have a model that each State would adopt, and under those circumstances for all practical purposes, we would have consistency among the States. But that is not the nature of this proposed legislation.

I think it is also important, as you pointed out, to consider the impact of such a lack of certainty, and predictability on small businesses. As you know, I was a small businessman before I began my political career. It is a tremendous, tremendous burden for a small business, and frankly, that is the approach that we have taken in these hearings—focussing on the small business people who have significant problems.

We had a person with 10 employees here the other day, another person with 36 and faced with six, seven, or eight pending suits. So I look forward to working with you, and working with the administration, in our effort to develop effective and balanced Federal legislation in this area. I think that we are going to be able to get through the potential difficulties ahead.

So, I thank you very, very much for your testimony this morning.

Secretary **Baldrige**. Thank you, Mr. Chairman.

Senator **Kasten**. The next panel will include Mr. Thomas Bendorf and Mr. James Sales. Our first witness on this panel will be Mr. C. Thomas Bendorf, Association of Trial Lawyers of America.

Mr. Bendorf.

STATEMENTS OF C. THOMAS BENDORF, ASSOCIATION OF TRIAL LAWYERS OF AMERICA; AND JAMES B. SALES

Mr. **Bendorf**. Thank you, Mr. Chairman. My name is Tom Bendorf, I am an attorney from Columbia, S.C. I represent the Association of Trial Lawyers of America, and I appreciate very much the opportunity of being here.

Ten minutes is not really a great deal of time in which to summarize even how we got here, let alone where we ought to go. But I think a little history is probably not inappropriate.

In the late sixties, a survey was made and published which reflected on the frequency of product liability claims. And the source of the material, or the nature of the study, is probably lost to us forever, but the consequences may well live with us forever. The fiction that developed relating to the number of product liability claims produced the kind of uncertainty to which everybody seems to refer, and led to such statements as those quoted in our testimony.

In 1976 the Insurance Information Institute said "The annual number of product liability cases was estimated at 50,000 in the 1960's, had multiplied to 500,000 by the early 1970's, and is now believed to be approaching a million. Judgments running into millions of dollars, unknown a few years ago, are now frequent."

In 1978, the same organization in the same publication said, "In the specific area of product liability, a Federal interagency task force estimated that 60,000 to 70,000 claims were filed in 1976." Not 1 million, not 2 million, but 60,000 or 70,000, which is probably not explosive growth from the 1960's estimate of 50,000 cases.

The result of the uncertainty or unknownability about product insurance was a very substantial and explosive rate of increase in premiums. And these premiums were obviously based on (a) uncertainty, and (b) a flawed perception of the level of claims and payments. And I would not attribute it to anything but error.

In 1976, we started discussing these subjects publicly. At that time, it was recognized that product liability insurance was included along with 18 or 19 other lines in general liability insurance. We asked for more precise information, and the National Association of Insurance Commissioners responded with a required form called the Product Liability Supplement,[1] several copies of which are included with our statement. This demonstrated in 1979 that the companies paid out to claimants 18¾ cents for every $1 of premium.

The figures most recently cited by the Secretary of Commerce are as false as they can be. They represent incurred losses, incurred losses which include the closure of claims for all prior years' occurrences as well as the year in which they are closed, and which include changes in reserve representing the payment of claims in future years.

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[1] The material referred to has been retained in the committee files.

So to compare all prior years' occurrences and to compare future years' occurrences which will be reported again as claims paid as if they were to be a portion of a single year's premium dollar, with no further reflection for investment income and no further reflection for prior or future premium income, produces the kind of mythology which apparently we are going to live with forevermore.

Are estimates of incurred accurate—are they somehow written in stone? Do they have some degree of infallibility? It is hard to know, but let us look at a couple of companies. St. Paul, for example, writes malpractice insurance; the No. 1 writer of malpractice insurance in the United States. They originally estimated incurred losses in 1976 of $62 million against $104 million of earned premiums. By the end of 1980, they had reestimated downward to $26 million, a reduction of 58 percent in the estimate of incurreds. We are using estimates of incurred as if they were forever valid, forever accurate.

How about general liablity, where we have product liability? St. Paul's 1977 original estimate of incurred was $110 million. For that $110 million estimate of incurred losses, they collected $147 million in earned premiums. Their current estimate of incurred losses is $82 million, a reduction of $28 million; a change in the estimate of incurred of 26 percent. What happens to the $28 million? Is it returned to the small businessman who paid the premiums? It is not.

The question here that we have been asked to address is one of need; the need to supplement the collective thinking of the Congress of the United States for that of the 50 State legislatures, the need to transfer the risk of harm from the wrongdoer to the innocent victim. We submit to you, and I think our statement probably says it better, that there is no such need, nor will there be such need, nor do we really, in the final analysis, believe that the Congress is going to recognize such a need.

Uncertainty is the basis on which insurance is based. If you eliminate the uncertainty, you can eliminate insurance. All the rest of tort law is just as uncertain; it depends on the State in which the tort occurs. The variance and, if you wish, discrepancies are considered a sign of health, not a sign of illness. Only big industry believes that the cost should be borne by the victim.

Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF C. THOMAS BENDORF, ASSOCIATION OF TRIAL LAWYERS OF AMERICA

Mr. Chairman and members of the Consumer Subcommittee of the Senate Committee on Commerce, Science and Transportation. I am pleased to be here today to testify on behalf of the Association of Trial Lawyers of America. My name is C. Thomas Bendorf and I am an attorney from Columbia, South Carolina. ATLA is a national law association representing over 40,000 members of the trial bar in 50 states. For the most part, our members represent the interests of injured consumers and users of products, rather than the defense of the manufacturer and seller of those products. I appreciate this opportunity to present the views of ATLA to the Subcommittee on the subject of the need for uniform product liability law in the United States.

We are assembled here today to address ourselves to the question of "need." The need to undertake the elimination of the two hundred year-old concepts of the relationships between the Federal Government and the several States. The need to tell the State Legislatures that they have no longer the ability or the right to pass laws or to refuse to pass laws regulating the rights and responsibilities of their citizens, one to another. The need to tell the judicial branch of the governments of the States that the source of all wisdom is here in the Congress of the United States—and that while they must accept responsibility for trying cases regarding tort liability for defective products, they may apply only the law which the Federal Congress has provided for them, not that which their own legislators deem appropriate.

We recognize that there are those who say there is such a need. They have told the Congress that there is such a need since the sixth day of September, 1976.

In 1976 we said:

"(A)s long as the threat of excessive claims can be imagined, the insurance industry will be shrieking for relief but, like an Edgar Bergen, through the lips of whatever captive is currently subject to their unusual and unconscionable pressures. It may be that there is something wrong with our courts and our techniques for administering justice, and if there is, Congress has the ability to find that out. I cannot believe, however, Mr. Chairman, that there is anything wrong with protecting innocent victims from the wrongdoing of others or compensating them fully when a wrongdoer has deprived them of life, health, ability, or the enjoyment of life. The insurance commissioners of the various States have been unable to get information they wish from the insurance companies on their experience in the products liability field. Congress was unable to get from the insurance companies precise figures on their (immunization) drug experience, but when examined by Congress, the insurance industry could remember only a handful of claims in the last five or six years. Surely, in this computer age, they have adequate information on which to base any conclusion they might wish to reach. This information should be presented to you in precise terms. It should describe to the dollar the premiums collected; it should describe to the dollar investment income on any reserves; it should describe to the dollar the amount of claims settled; the amount of claims filed; in short, their entire experience, not in percentages, but in dollars. . . .

"We have been disputing auto reparations for some eight years. We still lack figures that justify their generalities. Only the industry has the information. The price of admission to the arenas of controversy should be, at the very minimum, truth and candor. We are calling upon Congress for a comprehensive and total investigation of the insurance industry. We will repeat this call at every opportunity in the Nation's Capital, and at every opportunity in every State capital. The American public has long enough been inundated with slogans and catch phrases. If the new motto is to be 'We can no longer afford the protection of human rights,' then at least let the burden be on those who would deny the rights.

"They and they alone have the information. You and you alone can force it from them."

In 1977 we said:

This constitutes our sixth appearance before Congress on the subject of Product Liability Insurance. In our first testimony in September 1976, we said that surely, in this computer age, the insurance industry must have adequate information, and that that information should be presented to you in precise terms. We suggested that the information should describe, to the dollar, the premiums collected; it should describe, to the dollar, investment income on any reserves; it should describe the number of claims made, the number settled, and, to the dollar, the amount of claims settled.

Over a year later, Mr. Chairman, and to a great extent through your efforts, some specific information is being made public.

"Much of this mass of material cannot be classified as hard data. Much of it that can be is conflicting, and must be compared to earlier statements out of the same mouth before valid conclusions can be drawn. Much information is still to be made public. In January of this year, Acting Federal Insurance administrator, J. Robert Hunter, was quoted as saying that 'meaningful insurance date is the closest thing to a perfect vacuum that man has ever created.' That may or may not be true eleven months later but it is clear that many questions propounded by you, Mr. Chairman, and by other, have yet to be answered in satisfactory fashion."

We pointed out at at time that our concern and frustrations were echoed in the Final Report of the Federal Interagency Task Force on Product Liability (IATF-PL), which was replete with admissions, disclaimers, and warning based on the inadequacy of the available information.

Later that year, in our Comments on the Final Report of the IATF-PL, delivered to the LaFalce Subcommittee on December 29, 1977, we said in part:

"We have consistently suggested that there was only a crisis created by the casualty insurance industry, created out of the whole cloth, a crisis of no real cause, serving only the industry's political goals and a maneuver that made unwitting pawns and victims of manufacturers, seller, and consumers.

" Not a shred of evidence refutes our contention. Not a work of evidence demonstrates that the 'uncertainties of the tort-litigation system' contribute to the unaffordability or unavailability of product liability insurance. The industry has not yet revealed the premium income for product liability insurance, the total number of claims paid, the cost of those claims, the reserves generated by this line, the reserve investment income realized from this line, or any other information which will support the contention that 'uncertainties' contribute to anything other than the insurance industry's extrasensory rate hikes."

The manifestation of need by these neosocial architects was based in all those early years on the non-indentical twins of "availability" and "affordability." In the early years of this crisis these unholy offspring were reputedly the product of the cost of claims, either in number or severity. We will address ourselves to that. However, as time went by and as the claims nonsense was refuted by all who studied the subject, new scapegoats were found. I believe Stephen Leacock said, "A half-truth is like a half-brick, you can throw it twice as far." So were born a whole generation of new half-truths: "Litigious Society". . ."Social Inflation". . ."Deep Pockets" . . ."Transaction Costs."

What have we done since 1977? We have searched for hard evidence. How we have searched. By 1981 we are able to say and show:

Since that time, we have continued to apply ourselves to our own study of insurance. We have taken great pains, and undergone quite a little expense, to discover what insurance documents among the myriad of filings, compilations, and propaganda are useful. We have subscribed to almost every property/casualty item produced by the A.M. Best Company and have gone over each of them with diligence and care. When puzzled by inconsistencies and unverifiable statements, we have asked for clarification, but have seldom received it. We have consulted and briefed, and have been consulted and have been briefed, at every opportunity, all over the country.

What have we learned in these five years? A little more.

We have learned that the million claims a year are more like 70,000. We have learned that no one can find the fabled lawnmower case.

We know that some limited studies show a reduction in claims in some states.

We have learned what the insurance industry reported in 1980 as to their experience of 1979. We have attached an example (INA) of the Product Liability Supplement filed by each insurance company in response to the request made by the National Association of Insurance Commissioners (Attachment A).

We have been able to learn something about how much has been charged manufacturers, wholesalers, retailers, et al.

We have been able to learn how much has been paid in claims; how much it costs to pay those claims; how much the companies expect to pay (incurred lossed minus losses paid).

We have included in this statement some charts which show premium income, losses paid, losses incurred, and the ratios of these three elements (Attachment B). The figures were taken from the filings of the named companies. Of particular note is the paid loss ratio. Paid losses include those paid in 1979 for occurrences of all prior years as well as those which occurred in 1979. We have run the totals on a cumulative basis for some 150 Supplements. The ratios stabilize after 25 or 30 sets of figures. We have provided a total for the top 100 companies using filings in Ohio, D.C., New Mexico Washington, and New York. We are continuing our research.

We have also included charts which estimate investment income on reserves held for General Liability (Attachment C). It is in the line of General Liability that the bulk of Product Liability premimums and losses area reported. We have made two presumptions: first, that cash inputs and outputs flow on a straight line basis from January 1 to December 31: second, that a true rate of return on investments is a very conservative 10%. While these figures can be very confusing, the bottom line is our estimate for investment income.

We have also included other materials which may be helpful to you in understanding the casualty insurance experience of the last five or six years (Attachment D). We will elaborate on these during the hearing to the extent that time permits, and will be happy to respond to any questions which they might rise.

The reason we have included all of this statistical information is to show that there is no crisis. The Insurance Information Institute found that conclusion difficult and painful to accept but unavoidable nevertheless. In "Insurance Facts 1976" the Insurance Information Institute said:

Product Liability: The annual number of products liability cases was estimated at 50,000 in the 1960's, had multiplied to 500,000 by the 1970's, and is now believed to be approaching one million. Judgements running into millions of dollars, unknown a few years ago, now are frequent. Here, too, premiums are being forced up rapidly and in some cases coverage is becoming hard to get. The resulting problem is one which could affect the price or avilability of nearly every product on the market and could seriously impair the ability of many businesses or industries to function.

In "Insurance Facts 1978" the Insurance Information Institute said:

"In the specific area of product liability, a federal Interagency Task Force estimated that 60,000 to 70,000 claims were filed in 1976. The Task Force said that while the situation is not a crisis, it does 'present a potential disruptive effect on the economy.' The number of product liability lawsuits in U.S. District Courts rose 10.3 percent in fiscal 1977 (ended June 30) as compared with fiscal 1976.

"Meanwhile, the findings of a survey by Insurance Services Office showed that 87 percent of bodily injury payments and 89 percent of property damage payments in product liability cases are covered by insurance. The survey also showed the high cost of defending claims to be a significant contributor to the product liability problem. ISO said that for every dollar paid for claims, insurers pay an average of 35 cents more for defense costs in bodily injury cases; 48 cents in property damage cases, no matter who wins the case."

However, each year when Annual Reports are filed, Salome, the insurance industry, removes another veil. So, in late 1981, we were able to see a little more.

Let us look again, this time at 1980 Product Liability figures. What do they show? The companies paid 18.75¢ to claimants from each dollar of earned premiums in 1979. The companies paid 24.87¢ to claimants from each dollar of earned premiums in 1980. Within a few months the 1981 figures will become available. These figures are factual, not estimates.

Let us now look at General Liability. This is the line of which product liability is a part. Look at the results for 200 leading companies. 29 billion dollars in premiums earned. Five billion dollars in claims paid. Investment income on reserves probably equaled claims paid. Our charts show investment income at 3.5 billion dollars with a presumed rate of return of 10%. This has been unrealistically low for the last several years but we have wished to err on the side of conservatism. These figures certainly support no cries of crisis.

Arguments have been made and were repeated in the President's Interagency Task Force Reports that 40¢ of each dollar goes to claimants and the 29¢ of each dollar goes to attorneys. These figures are simply and totally false. They are based on insurance industry estimates of future payments which ignore future income, future adjustments and investment income. The only true figures, factual figures which include no estimates, which require no perception, no crystal ball are the claims paid figures now available from the Product Liability Supplement. No arguments based upon "incurred losses" have any legitimacy.

One thing remains eminently clear. Manufacturers and sellers pay too much for product liability insurance. The Congress provided last year an escape valve when it enacted the Risk Retention Act. It is obviously too early to know how much protection that act can provide. It is obvious that question of need cannot be answered prior to a thorough examination of the effect of that act upon the manufacturers and sellers.

No need can be demonstrated at this time. No effort should be expended at this time. Results reported in Product Liability Supplements should be examined at least for two more years. Some results from the Risk Retention Act should be studied but it remains clear that there can never be a need to transfer the cost of injuries from the wrongdoer to the victim.

The proper object of tort reform is the elimination of wrongs, not the elimination of rights.

Product liability results from defective products and from defective products alone. To enact a National Protection Act for the Producers of Defective Products simply denies every citizen rights, rights won before the courts and the legislatures of the various States.

This committee will have time to engage in a wholesale investigation of the casualty insurance industry, its bookkeeping techniques, its rhetoric, its advertising, its grass roots lobbying, its record of tax benefits, in short, the entirety of its conduct and the impact of its conduct upon every citizen of the United States. This committee will have the time, but will it have the appetite?

Is there a need? Is this the way to fill the need?

The Association of Trial Lawyers of America would like to see the end of the product liability lawsuits . . . when this can be accomplished by one or the other or a combination of the following two means:

(1) When the insurance industry will settle just claims justly;

(2) When there are no more innocent victims of defective products.

Proposals to shift the burden of injuries from the manufacturers or distributors of defective products to the victims of those defects must outrage the conscience of all right thinking persons.

Finally, we would like to quote from an editorial appearing in the "Trial Diplomacy Journal."

It says in part while commenting on the once proud bastion of free-enterprise that was American industry. . . .

". . . Well, let's look at another subject presently occupying the attention of the United States Congress. This subject is Product Liability. The apparent entirety of the industrial might of this great nation, while the handmaidens of inflation and recession are presenting real threats to all of our citizens, these giants of industry are dedicated to the passage of Federal legislation which will repeal all State tort law which relates to manufacturers, distributors and retailers.

"Thus, 'in one fell swoop' the Constitutions of the States are to be pre-empted. 'In one feel swoop' America's industrial might would have the Federal Government forevermore substitute its collective judgement for that of 50 State legislatures, the entirety of judicial opinion and the juries who have heretofore exercised their judgement of the appropriate relationships between wrongdoers and those who have been wronged.

"The purpose? It is, of course, simply to shift the burden of the cost of reparation from the tortfeasor, the wrongdoer, to the victim, he who has been wronged.

"This, then, is the new look of free enterprise. This seems to have become the look of a 'New Federalism;' a look that could be expected of advocates of collectivism or socialization of our free institutions—but with the support and arguing of our advocates of free enterprise, of individual rights and freedom?

"Where are the ghosts of Jack Frye, of Eddie Rickenbacker? Where are the ghosts of Henry Ford, of Thomas Edison? What has happened to our sense of the rightness and wrongness of human conduct?

"What may we expect next of this new generation of American Industry?"

Senator KASTEN. The next witness is Mr. James B. Sales from Fullbright & Jaworski in Houston, Tex. Mr. Sales.

Mr. SALES. Mr. Chairman, my name is Jim Sales from Houston, Tex., with the firm of Fullbright and Jaworski. I appreciate the opportunity to be here, and to speak on behalf of the effort of the Senate and of the Congress generally to enact remedial legislation in the product liability area.

I think in order to understand what has been talked about, everyone seems to have neglected how this animal started and what it really is.

Strict tort liability was not legislatively enacted into law; rather it is predicated on section 402A of the restatement, which is a codification made by some academicians in 1965, premised largely on a case in New Jersey involving implied warranty called Henningsen, and a California case called *Greenman* v. *Yuba Power Products.* And on the basis of those two cases the restatement people authored a theory unique in the jurisprudence of this country that basically states that anyone who is a seller of a product and who sells a defective product that reaches the user without substantial change, that is unreasonably dangerous and causes injury, is strictly liable in tort.

It is important, extremely important, and it is a quintessential distinction to distinguish between the usual negligence tort reparation system of this country that has evolved over the 200 years of our jurisprudence and strict tort liability which is 17 years old. Negligence focuses on fault—wrongdoing by the product supplier. Strict tort liability focuses on one thing only, the condition of the product, irrespective of fault by the supplier.

A consideration of the rationale that undergirds this whole doctrine is extremely important, and the reason there is need for Federal legislation. The premise, as articulated by the courts that have adopted this concept, has been socioeconomic. That is, as between the injured party on the one hand and the manufacturer on the other who makes a profit by selling a product, the manufacturer is better able to absorb the cost and to pass on that cost, either by passing on the cost to the consumer or by paying insurance premiums, and thereby distributing the risk. Risk distribution in interstate commerce is what is involved. That is the entire rationale upon which strict tort liability has evolved.

The inital concept was not a bad doctrine. It involved a new form of liability for a flawed product, one that came off the assembly line that was not in compliance with blueprints. The wheel that fell off the car, a broken axle because of a fatigue failure; a drug that was adulterated—no problem. But the courts very quickly expanded the concept to embrace within the ambit of its applicability design defects in which the product was perfectly well made but some allegation of design defect was alledged to have made it unreasonably dangerous.

The courts took it from that point and extended it to include a design that did not cause or contribute to cause the accident that resulted in the injury, but merely caused an enhancement of the injury. As an example, a driver while intoxicated and driving on the wrong side of the road, struck a bridge abutment. It was alleged that the placement of the steering column was improper, causing more servere injury than would have occurred but for that design.

They extended it even further to include marketing defects thereby taking warnings outside the realm of negligence. Thus, included within the ambit of coverage was the failure to warn, failure to warn adequately, and the failure to follow directions. And the courts make a distinction that the mere following of directions is not sufficient. For example, a Warning: do not use this grinder without a protective shield is not, said the court in *Bituminous* v. *Black & Decker*, sufficient. You must warn the user that the grinder may explode and put his eye out, thereby carrying it to its extreme.

In addition, in adopting the restatement, as the courts have done judicially,—and again, not by legislative fiat, the courts have eliminated contributary fault on the part of the user of that product as a defense.

Comment n of the restatement completely eliminates contributory negligence as a defense. The defenses that have remained are assumption of the risk and misuse. Assumption of the risk being the harsh doctrine that it is—that is, you either recover all or you recover nothing, the courts have imposed very stringent requirements. The requirement is that the user must subjectively know and appreciate the danger and voluntarily stick his hand in that cutter machine, or in that roller. An impossible defense, and meaningless to the defendant.

Misuse is a defense, but only if the defendant can prove to the satisfaction of the trier of fact that the manufacturer could not reasonably foresee the manner in which the plaintiff misused the product. Anyone sitting down here at this table, I suggest, can foresee any bizarre misuse of a product. And that knocks out the defense. In essence, it is no defense.

Some States have felt badly about this situation, like California in *Daly,* and have judically adopted a form of comparative fault. In Wisconsin, in order to get around the problem in using their comparative negligence statute, it adopted strict tort liability and then characterized it as a form of negligence per se so as to bring it within the comparative negligence statute. Another aspect of this harsh doctrine.

The courts have eliminated, in a number of States, the requirement of the restatement itself which requires that the product be unreasonably dangerous. California led the way again in *Cronin* and was followed by New Jersey in *Glass* v. *Ford Motor Co.,* Pennsylvania in *Azzarello* and most recently, Hawaii in *Boudreau,* in eliminating that as a requirement. So all the user has to do is say the product caused an injury, and that puts him over the hump.

The problem has even been further aggravated by the fact that the standards for judging design are impossible. California uses a two-prong standard; reasonable consumer expectation or if the product caused an injury, the manufacturer has the burden of proving that is not an unreasonably dangerous design. In Texas, the standard is unreasonably dangerous as designed taking into consideration the utility of the product versus the risk of harm.

In Oregon, the standard is: Would a reasonable person—if that person knew of the hazard, put that product in the stream of commerce, and then impute to that person knowledge that he does not have. And in Pennsylvania in *Azzarello,* the standard is: It is defectively designed if any feature makes it unsafe, or if it fails to contain any safety feature that would render it totally safe. Basically it makes the supplier an insuror which is not even a strict tort liability.

Why then, it might be said, should we not let the judiciary handle the problem? Well, I think, just as this brief discussion points out, the judiciary in the various States have predicated the doctrine on a socio-economic policy. This is more properly the province of a legislative body, not the courts, particularly as it impacts upon interstate commerce. We are talking primarily now about regional, national and international manufacturers who comprise 90 percent of those who are now being slowed with the heavy damage verdicts, the big settlements and who are paying the heavy premiums.

Another consideration why it should not be within the Federal domain—within the State domain, I beg your pardon—it seems to me is the fact that in the imposition of strict tort liability and the distribution of the risk, as the courts are doing by imposing this new and novel concept, the effect of that is to factor into the cost of every product the additional cost of settlements, verdicts, and the prohibitive cost of insurance premiums.

That means that innocent consumers who make up the vast majority of this United States are paying for the cost of strict tort liability; not just the manufacturer or the insurance company. The manufacturer who cannot pay the cost goes out of business, as we know, and many have. And for everyone who has gone out of business, there have been a loss of jobs to go with it.

The State approach—is it applicable? As opposed to the Federal approach? I say it is not. I worked for two sessions in the Texas legislature on this issue to no avail. Most States, unfortunately, have enacted no legislation at all. Some States have a patchwork, bandaid approach in which they have adopted one or two provisions from the Uniform Product Liability Act. These really are meaningless as applied, and totally ineffective. And third, those States that have enacted a comprehensive, Uniform Act do not bear any uniformity or parallelism with their sister States.

So we have a patchwork, crazy quilt approach to interstate commerce. It makes absolutely no sense. A State resolution by legislative edict will not solve the problem; it will only enhance the problem, in my opinion.

The Federal approach, in my opinion, is the only appropriate approach because it deals with interstate commerce. Most importantly, it is equipped to deal with the very underpinnings of the whole doctrine and its socio-economic considerations which, in our society, properly belong in the legislative halls to balance the interests of all—not only the manufacturer and the injured party—but everybody. I think that just conducting these hearings and getting the input of other segments of our society establishes the reason that there must be uniformity.

Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF JAMES B. SALES

The concept of strick tort liability was initially formalized in the Restatement (Second) of Torts § 402A (1965). Until the early 1960's, causes of action for injuries and damages caused by the products were premised on negligence and breach of warranty. Many attorneys were becoming increasingly dissatisfied with the traditional impeditments to recovery of damages those theories provided. The authors of the Restatement, relying in large measure on the landmark case of *Greenman* v. *Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963), responded by creating a novel concept of tort reparations. Section 402A represents the lynchpin of today's doctrine of strict tort liability or as it is more commonly characterized, product liability. Under the Restatement, a party injured in connection with the use of any type of product may recover damages against any supplier in the distributive chain of that product upon proof that the product was defective, that it reached the consumer without substantial change from the time it left the hands of the manufacturer, that the condition of the product rendered it unreasonably dangerous, and that this dangerous condition was a cause in fact of injury to the user.

Strict tort liability differs noticeably from the concept of negligence which has been the principal tort doctrine for recovery of personal injury damages in this country since the very genesis of a tort reparation system. Negligence evaluates the conduct of the product supplier while strict tort liability focuses entirely on the condition of the product. [*Gonzales* v. *Caterpillar Tractor Co.*, 571 S.W.2d 867 (Tex. 1978); *Seley* v. *G. D. Searle & Co.*, 423 N.E.2d 831 (Ohio 1981).]

The underlying rationale for this unique and far-reaching doctrine is essentially socioeconomic in origin. Basically, the doctrine rests on the principle of "the deep pocket." As between an injured party and a product supplier who has made a profit from either the manufacture or sale of products, it is better, reason the advocates of strict tort liability, that the product supplier absorb the cost of the injury both because the supplier has made a profit from the business and because the product supplier is in a better position to pass on the cost of large damage verdicts to the consuming public in the marketplace. [*Greeman* v. *Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963); *Vandermark* v. *Ford Motor Co.*, 391 P.2d 168 (Cal. 1964).]

The most significant problem that has arisen has been the judicial adoption and the judicial reformulation of this concept of liability even behond the parameters of the Restatement. Initially, the Restatement was designed to provide injured parties a relatively easy method of recovering damages caused by products that did not meet consumer expectations, e.g., a product that was flawed or, as it is technically described, a product that failed to conform to the manufacturer's own specifications and design blueprint. As initially formulated, the doctrine was never perceived as embracing a product that was perfectly manufactured in compliance with the plans and specifications of the manufacturer but was deemded to be defective because of some design configuration. Unfortunately, the courts quickly liberalized the literal provisions of the Restatement and expanded the concept of embrace, in addition to the flawed product, a design defect. [*Pike* v. *Frank G. Hough Co.*, 467 P.2d 229 (Cal. 1970); *Rindlisbaker* v. *Wilson*, 519 P.2d 421 (Idaho 1974); *Bexiga* v. *Havir Mfg. Corp.*, 290 A.2d 281 (N.J. 972); *Rourke* v. *Garza*, 530 S.W.2d 794 (Tex. 1975); *Reid* v. *Spandone Machine Co.*, 404 A.2d 1094 (N.H. 1979).] The concept of strict tort liability was likewise soon expanded to products affected with marketing defects., e.g., failure to warn, failue to warn adequately and/or a failure to provide appropriate or adequate directions for efficient and/or safe use. [*Williams* v. *Brown Mfg. Co.*, 236 N.E.2d 125 (Ill. 1968); *Tucson Industries, Inc.* v. *Schwartz*, 501 P.2d 936 (Ariz. 1972); *Technical Chemcial Co.* v. *Jacobs*, 480 S.W.2d 602, (Tex. 1972); *Freund* v. *Cellofilm Properties, Inc.*, 432 A.2d 925 (N.J. 1981); *Borel* v. *Fibreboard Paper Products Corp.*, 493 F.2d 1976 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974).]

While extending the concept of strict tort liability to the design and marketing areas, the courts have likewise judicially reformulated the term "seller" in the Restatement to include "any supplier introducing a product into the stream of commerce." As a consequence, in addition to imposing strict tort liability on retailers, wholesalers, component suppliers and distributors, many jurisdictions have extended the doctrine to sellers of used products [*Realmuto* v. *Straub Motors Inc.*, 322 A.2d 440 (N.J. 1974)], homebuilders [*Kriegler* v. *Eichler Homes, Inc.*, 74 Cal. Rptr. 749 (Cal. 1969)], lessors [*Rourke* v. *Garza*, 530 S.W.2d 794 (Tex. 1975); *Price* v. *Shell Oil Co.*, 466 P.2d 722 (1970)], licensors and franchisors of products [*Connelly* v. *Uniroyal, Inc.*, 389 N.E.2d 155 (Ill. 1979)], service-sale providers such as beauticians and hospitals [*Newmark* v. *Gimbel's Inc.*, 258 A.2d 697 (N.J. 1969)] and *Thomas* v. *St. Joseph Hospital*, 618 S.W.2d 791 (Tex.Civ.App.—Houston [1st District] 1981, writ ref'd n.r.e.)], and even to successor companies when the product was manufactured by a predecessor company. [*Ray* v. *Alad Corp.*, 560 P.2d 3 (Cal. 1977); *Ramirez* v. *Amsted Ind., Inc.*, 431 A.2d 811 (N.J. 1981).] Concomitantly, defenses normally available in negligence and breach of warranty actions have been either totally abrogated or significantly diluted in "product liability" cases. [*Henderson* v. *Ford Motor Co.*, 519 S.W.2d 87 (1974); *Union Supply Co.* v. *Pust*, 583 P.2d 276 (Colo.App. 1978); *Hughes* v. *Magic Chef, Inc.*, 288 N.W.2d 542 (Iowa 1980); *Suter* v. *San Angelo Foundry & Mach. Co.*, 406 A.2d 140 (N.J. 1979); *Findlay* v. *Copeland Lumber Co.*, 509 P.2d 28 (Or. 1973); *Smith* v. *Smith*, 278 N.W.2d 155 (S.D. 1979); *McCown* v. *International Harvestor Co.*, 342 A.2d 381 (Pa. 1975).]

The usual problems for the national and/or regional manufacturer or distributor of products caused by increased exposure to liability are compounded by the erratic patchwork-quilt standards that have been fashioned by each jurisdiction for evaluating whether a particular design is defective and one for which the supplier is strictly liable. In essence, the national or regional manufacturer or supplier of products who introduces a product into any of many states of this country cannot design a product with any assurance that the product will not be adjudged defective by the trier of fact in a particular jurisdiction. For example, in alleged design defect cases, there are differing standards or tests by which a trier of fact is obligated to evaluate the design. In California and Alaska [*Barker* v. *Lull Engineering Co.*, 573 P.2d 443 (Cal. 1978) and *Caterpillar Tractor Co.* v. *Beck*, 624 P.2d 790 (Alasak 1981)], the standard provides altneratively that: (a) a product may be found defective in design if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect it to when used in an intended or reasonably foreseeable manner or (b) a product may alternatively be found defective in design if the plaintiff demonstrates that the product design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design. In Texas [*Turner* v. *General Motors Corp.*, 584 S.W. 2d 844 (Tex. 1979)], and other jurisdictions a product is defective in design if "it is unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use." Other jurisdictions, such as Wisconsin and New Jersey [*Suter* v. *San Angelo Foundry & Mach. Co.*, 406 A.2d 140 (N.J. 1979) and *Vincer* v. *Esther Williams All-Aluminum Swimming Pool Co.*, 230 N.W.2d 794 (Wis. 1975)], deem a product defective in design if it is established that the product fails to perform as safely as an oridinary consumer would expect when used in an intended or reasonably foreseeable manner. Some jurisdictions, such as Oregon [*Phillips* v. *Kimwood Machine Co.*, 525 P.2d 1033 (Or. 1974) and *Wilson* v. *Piper Aircraft Corp.*, 577 P.2d 1322 (Or. 1978)], deem a product defective when a reasonable person would not have put the product in the stream of commerce if he had had knowledge of its harmful character. Yet other jurisdictions, such as Pennsylvania [*Azzarello* v. *Black Bros. Co.*, 391 A.2d 1020 (Pa. 1978)], essentially transforms the supplier of the product into an insurer by declaring a design defective "where the product left the supplier's control lacking any element to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use." It is apparent from a review of the standards of these jurisdictions, and the other jurisdictions utilizing yet other variations of these tests, that no manufacturer can expect to engineer a design that will withstand the vague, inconsistent, and generally meaningless standards by which the product will be evaluated in the various states.

The problem is further complicated. Many jurisdictions continue to adhere to the Restatement's requirement that the defect in the product render the product unreasonably dangerous. [*Kirkland* v. *General Motors Corp.*, 521 P.2d 1353 (Okla. 1974); *Eickelberg* v. *Deere & Co.*, 276 N.W. 2d 442 (Iowa 1979); *Potthoff* v. *Alms*, 583 P.2d 309 (Colo. App. 1978); *Darryl* v. *Ford Motor Co.*, 440 S.W.2d 630 (Tex. 1969).] Yet other jurisdictions have perfunctorily rejected the Restatement requirement that the defect render the product unreasonably dangerous as a predicate to the imposition of strict tort liability. [*Cronin* v. *J. B. E. Olson Corp.*, 501 P.2d 1153 (Cal. 1972); *Azzarello* v. *Black Bros. Co.*, 391 A.2d 1020 (Pa. 1978); *Glass* v. *Ford Motor Co.*, 304 A.2d 562 (N.J. Super. 1973); *Boudreau* v. *General Electric Co.*, 625 P.2d 384 (Hawaii App. 1981).]

The national or regional manufacturer and/or supplier of products is confronted with yet another dilemma. The traditional defense of contributory fault has frequently been rejected in strict tort liability actions even though it remains a viable defense in a negligence or a warranty action. [*Henderson* v. *Ford Motor Co.*, 519 S.W.2d 87 (Tex. 1974); *Williams* v. *Brown Mfg. Co.*, 261 N.E.2d 305 (Ill. 1970); *Smith* v. *Smith*, 278 N.W.2d 155 (S.D. 1979).] Many jurisdictions utilize "misuse" and/or "assumption of the risk" as defense or partial defenses. [*General Motors Corp.* v. *Hopkins*, 548 S.W.2d 344 (Tex. 1977); *Ford Motor Co.* v. *Matthews*, *291 So.2d 169 (Miss. 1974)*; *Kerns* v. *Engelke*, 369 N.E.2d 1284 (Ill. App. 1977); *Mico Mobile Sales & Leasing, Inc.* v. *Skyline Corp.*, 546 P.2d 54 (Idaho 1975).] Because some defenses, such as assumption of the risk, are applied as an "all or nothing" concept, the courts have been noticeably reluctant to apply the defense in a product case. [See Sales, Assumption of the Risk and Misuse in Strict Tort Liability—Prelude to Comparative Fault, 11 Tex. Tech. L. Rev. 729, 738 (1980).] In order to alleviate the problem, some jurisdiction have applied existing comparative negligence statutes to strict tort liability actions by characterizing strict tort liability as a form of "negligence per se." [*Dippel* v. *Sciano*, 155 N.W.2d 55 (Wis. 1967).] Other jurisdictions have simply held that comparative negligence statutes apply to strict tort liability actions because the legislature, in enacting the statute, did not indicate that strict tort liability would not be included. [*Sun Valley Airlines, Inc.* v. *Avco-Lycoming Corp.*, 411 F.Supp. 598 (D. Idaho 1976).] Other jurisdictions have applied existing comparative negligence statutes to strict tort liability but have severely limited the type of conduct that may be considered to a hybrid form of assumption of the risk. [*Sutter* v. *San Angelo Foundry & Machine Co.*, 406 A.2d 140 (N.J. 1979).] A few jurisdictions, recognizing the inequity of the existing situation, have judicially formulated a comparative fault doctrine that evaluates the total fault of all parties contributing to the injury-producing event and allocates liability accordingly. [*Daly* v. *General Motors Corp.*, 575 P.2d 1162 (Cal. 1978); *Caterpillar Tractor Co.* v. *Beck*, 593 P.2d 871 (Alaska 1979).] Although some jurisdictions have recognized the inequity and have attempted to alleviate the situation by application of some form of comparative fault, other jurisdictions essentially provide no meaningful defenses despite gross fault by the injured party and/or by a third party such as an employer who contributes to the event. Whether a product supplier is entitled to assert a defense depends entirely on the fortuitous circumstances of the jurisdiction in which the accident-producing event occurs. [Compare *Daly* v. *General Motors Corp.*, 575 P.2d 1162 (Cal. 1978) with *Caterpillar Tractor Co.* v. *Gonzales*, 599 S.W.2d 633 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.).]

Additionally, a significant number of industrial accidents are caused by the tortious conduct of an injured party's employer in removing safety guards from equipment, in failing to properly maintain the workplace equipment and other similar conduct. In most jurisdictions, the employers are totally insulated from liability by the appellate Worker's Compensation laws. Not surprisingly, the injured employee sues the manufacturer of the machine involved in the accident.

The problem is obvious. The entire doctrine of strict tort liability first articulated in the Restatement (Second) of Torts, § 402A has become totally unbalanced and the manner and method of its application against a manufacturer is totally dependent on the philosophical attitude of the particular jurisdiction involved.

The doctrine of strict tort liability has evolved in an explosive and, in many instances, unbalanced manner. The erratic nature of the doctrine's development, the expansion of the doctrine beyond the literal provisions of the Restatement section which sired the doctrine, and the varying manner in which strict tort liability has been imposed on manufacturers and suppliers of products has, in too many instances, approached the point of imposing an insurer status on the manufacturer. This has occurred notwithstanding that strict tort liability, in legal theorem, remains an ex delicto and not an ex contractu cause of action.

The inquiry may be posed: Why not permit this doctrine to remain exclusively within the ambit of judicial analysis and interpretation rather than defer to state or federal legislation? The principal argument for reform is, of course, that from its inception, the doctrine of strict tort liability has been premised on a socio-economic theory that the manufacturer-supplier of a product is better able to absorb the cost of injuries sustained in a product-related accident. This deep pocket theory and its corollary precept of distributing the risk among the consuming public is exactly the type of policy evaluation that more appropriately belongs within the province of legislative rather than the judicial system. Yet the doctrine of strict tort liability has been adopted, formulated, refined, and applied solely through the judicial system and without any effective legislative consideration.

The added inquiry may be posed: Why not permit each state to approach the problem in its own legislative fashion? When the problem is placed in perspective of the 17 years that strict tort liability has been recognized, individual state action has been, and will be in the future, totally ineffective to remedy the various problems currently in existence. Other than perhaps in connection with manufacturers and suppliers whose products are distributed solely within the boundaries of a single state, there are three basic reasons why state action is ineffective: (1) most states have failed, despite repeated efforts, to enact any type of product liability reform law to alleviate the existing unbalance; (2) the token reform of some states in adopting limited sections of the Uniform Product Liability Act or other similar model that acts as a band-aid approach to product liability reform has been essentially ineffective; and (3) the states that have enacted a comprehensive product liability reform program have failed to establish any real uniformity or parallelism with the product liability reform laws of their sister states. This presents, therefore, an unattractive environment for regional, national and international manufacturers and suppliers of products to market their products.

Many question the need for any product liability reform. A significant group argues rather forcefully that the judicial adoption, implementation and expansion of strict tort liability has compelled manufacturers and suppliers of products to bear the cost of compensating individuals injured in product related accidents and has helped insure that manufacturers design and manufacture only the safest possible product in order to avoid liability. It is true that manufacturers have absorbed the loss caused by catastrophic injuries but, because of the absence of any meaningful uniform standards or guidelines it is questionable to what extent this has enabled the manufacturers to make products better and less likely to cause injury. In rebuttal, the inquiry may be posed whether the socioeconomic concept of risk distribution imposed on manufacturers and suppliers of products under the present situation is fair to the innocent consumers who purchase these products in the marketplace. It is axiomatic that the cost of large judgments and the increased cost of insurance premiums must be factored into the cost of the product. The payment for this additional cost in the form of increased cost of the product is borne by the innocent consumers of the product.

Some may also argue that strict tort liability, as it has developed, has forced out of business manufacturers and suppliers of products who are not qualified to market products to the public. Unfortunately, large manufacturers of products can survive the burden of unfettered strict tort liability but the marginal manufacturers and suppliers, as well as the small "mom and pop" operations cannot, and, in fact, have not survived the impact of this doctrine. Many of these concerns have long since terminated business, either because of large judgments or because the cost of purchasing insurance to continue in business has been prohibitive. This, in turn, has resulted in the termination of many employees who otherwise are deprived of gainful employment. It has also had the effect of reducing competition from smaller manufacturers vis-a-vis larger manufacturers. Reducing competition certainly does not contribute to more competitive pricing of products.

The doctrine has engendered other problems. Manufacturers and producers of products, whether new appliances or prescriptive medications, have traditionally utilized American ingenuity, creativity and a future-looking attitude in developing new products which have benefitted all members of the public. With the advent of strict tort liability, this creativity and willingness of manufacturers to pioneer in yet unchartered areas of technology has been diminished. This represents a very real loss to the public.

This doctrine of strict tort liability, when properly balanced with the interest of both the injured party as well as the manufacturer and supplier, represents a valuable legal doctrine in our system of jurisprudence. In its present unbalanced state, however, it is causing significant distress. It seems only appropriate that the doctrine be scrutinized in the national legislative forum and that, after due and appropriate consideration of all interests affected by this doctrine, that appropriate remedial legislation be enacted both to restore a much-needed balance and to structure uniform standards for evaluating product integrity.

Senator KASTEN. Mr. Sales, thank you very much for your outstanding testimony. I would like to ask you to comment on Mr. Bendorf's statement, particularly his suggestion that discrepancy in the law was beneficial; that uncertainty was the nature of the animal, so to speak, and that we ought not be concerned about it.

Mr. SALES. I have never known uncertainty to be of any help, Mr. Chairman, except to cause manufacturers to pay large sums in settlement because they do not know what the court and the jury will do to them next.

The problem, unfortunately, with the system is there is no uniformity, and a manufacturer of a major product, such as a vehicle, cannot go to its engineering department and say here is a uniform standard, and if you engineer this product in this fashion we can distribute this product in 50 States, and we can rely on the fact that it will be nondefective in all 50 States. As opposed to the present system where, in Texas, it is found to be defective, while in Florida the same, identical product is found to be nondefective. In essence, a dichotomy occurs.

Senator KASTEN. Mr. Bendorf, you made a number of comments about insurance rates. As you pointed out, product liability costs for manufacturers are ultimately granted on the number and the size of the product liability claims. Do you have any evidence that the number of product liability claims has decreased over the last 10 years?

Mr. BENDORF. Two surveys with which I am familiar have indicated they have decreased—that made by the joint committee on tort liability in California studying the entirety of the tort world, and that made by Carnegie-Mellon University in Pittsburgh for the western Pittsburgh area. Evidence to the contrary is educed by the increase in Federal filings.

I would hope there would have been an increase in federal filings. I would have expected it to probably double when you increased the Federal court by 30-some percent.

The ability to file a lawsuit depends on the capacity of the court, obviously. There is no evidence of an increase in claims' costs. There is no evidence of an increase in claims. The ISO indicated that about $250 million was paid out annually, something in excess of $1 per citizen. I think that the evidence might indicate that as much as $500 million was paid out annually now on the basis of the 1980 figures; somewhere in the neighborhood of $2 for every citizen.

It is $2 for every citizen to protect his rights against defective products. Insurance costs are supposed to be frequency times severity equals raw costs. It is a very simple formula. However, the frequency and the severity are subject to actuarial adjustment and if either of those elements are incorrect the total will be incorrect. We simply submit that for 10 years the total has been not just incorrect, but grossly incorrect.

Senator **Kasten**. Mr. Bendorf, are those studies that you refer to national studies?

Mr. **Bendorf**. One was for California, one was for the western region of Pennsylvania. I know of no national studies. There are jury verdict research studies which indicate that in the history of the United States there have been as many as 400 total verdicts in excess of $1 million, and those are increasing as the dollars valve decrease.

Senator **Kasten**. I would like to make just one comment. You suggested, and you are right, that the number of product liability claims filed in the Federal courts in 1974 was only 1,500, while it had reached 4,000 in 1978, 7,000 in 1980, 9,000 in 1981.

I would suggest that that increase is far and away a larger percent increase than other areas of the law, despite the fact that the Federal courts are expanding. You might have a State study or two—and we would like to see those. If you could submit those studies for the record, the committee would appreciate it.

But in light of this kind of an increase, I do not see how you can argue that the problem is going away. Let me switch it down to an individual level. We had some people here the day before yesterday, including an individual businessman, who had 36 employees. He had been in business for over 30 years and he currently was faced with eight claims.

He did not know what was going to happen with the lawsuits, all of which had been filed since 1976. He had not been sued before that time, and all of a sudden the lawsuits started mushrooming on him. He is absolutely unsure of where he is going.

Therefore, unless you have significant statistically valid national evidence to the contrary, I do not feel that you can make the claim that this problem is going away. It is not the opinion of small businessmen and women that it is going away. It is not the opinion of the Congress that it is going away. And it seems the evidence is simply contrary to the claims that you and your associates are making.

Mr. **Bendorf**. There is one sure source, Mr. Chairman, of that information, and that is found through closed claims studies. There is no other valid information sample or otherwise. The Federal court reflects the number of filings in Federal court, and the filings in the Federal court have implications far beyond the question of product liability alone.

The number of claims filed in the States can be provided by the insurance industry. The level of claims paid in the States can be provided by the insurance industry. It is impossible for me to provide information on the subject of claims. But it is equally apparent that they have not and will not—so you can ask me to provide the information, and I will do my best. I hope that you will ask them to provide the information as well, because they have it.

Senator **Kasten**. You said that there should not be any Federal product liability law. Yet when tort law is proposed at the State level, trial lawyers point out the futility of achieving reform that way. Just recently in Ohio, for example, the trial lawyers—maybe it was you; I do not know if you were out there, but—the trial lawyers argued against an Ohio product liability law on the basis that 80 to 90 percent of all the goods manufactured in Ohio are sold outside the State. Therefore, there was no reason for a State law.

You cannot have it both ways. It seems to me that the American trial lawyers are opposed to product liability legislation by either the Federal or the State governments.

Mr. **Bendorf**. We are opposed to any so-called tort reform that abrogates, derogates, reduces the human rights of American citizens to be free from harm from a defective product. The proper object of "tort reform" is the elimination of wrongs, not the elimination of rights.

We will support any proposal which will reduce the necessity of going to court, but we will oppose anywhere any proposal which denies the right to go to court. And we will make the argument in Wyoming that it is totally inappropriate for the Wyoming citizens to give up their rights when in fact they have virtually no product manufacturers.

The deprivation of rights in State A in order to benefit the companies in Ohio or Pennsylvania or Michigan or New York or California may require Federal action if it is those rights you wish to deny, but does that constitute good government?

Senator **Kasten**. Mr. Sales, could you comment on that?

Mr. **Sales**. Yes, Mr. Chairman. It seems to me that we are missing the point. To begin with, we are not depriving any citizen of any rights. We are talking about a concept of strict tort liability that was judicially formulated and articulated and adopted by the judiciary, without any legislative input from any State legislature or from the people of any particular State.

It does not represent a deprivation of rights when the court adopts a novel theory, because the theories that have prevailed and have evolved through the centuries of common law, negligence and implied warranty, continue to remain an alternative and existing cause of action.

And additionally, it is important to note that I would agree with my colleague here that Federal legislation would be inappropriate in tort reform if we were talking about automobile accidents, where the act occurs in the State of Texas or the State of Ohio, or medical malpractice, where the act occurs in the State of Texas or the State of Ohio, and where the State interest is totally within that State's boundaries. But we are talking about a very unique problem here. We are talking about manufacturers of products that are sold and distributed on a national and international basis.

It is uniquely interstate commerce. It is uniquely different from any other area of tort law that we have in this country, and it is for that unique reason that only a uniform approach, as articulated by the Federal Government, it seems to me can bring some organization and some certainty out of this chaos which we are in, and even the courts.

For example, one appellate court in Texas recently beseeched the legislature to please enact some legislation to pull them out of a dilemma that was created by the judicial march of strict tort liability, simply because they had reached an impasse and felt that the situation was an inappropriate one for the jurisprudence of our State.

Senator **Kasten**. Mr. Sales, the American Bar Association in testimony prepared for delivery later this morning says that it would be hard to integrate a product liability law into other areas of law. For example, an auto accident might result in a suit between two drivers and a suit by one driver against a manufacturer.

Could you comment on that problem?

Mr. **Sales**. I understand what the ABA's position is, and I am a member of the ABA, but I take issue with their position. I do not foresee any problem at all, Mr. Chairman, because we are talking about Federal reform that gives certainty to the law. The problem that is being raised by that question involves contribution and indemnity among multiple parties sued in an accident that occurs, say, in the State of Ohio between a driver who runs a red light at an intersection, hits a car, and the car overturns, and it is claimed that the roof is defective after it overturns and causes further injuries.

So the suit is against the driver of the automobile under negligence and strict liability against the manufacturer of the car for a roof that was only two times stronger than the regulatory standards prescribed for roofs. I do not see any problem. That is a contribution issue and it has never posed a problem.

We are talking about a reform that gives certainty to design, warning and marketing, and to the defenses available in strict liability. It in no way impacts upon or affects contribution or indemnity, and that is the only issue that is raised by that question.

Senator **Kasten**. Thank you.

I would like to ask further questions, but unfortunately we have two or three panels that are to follow. There may be additional questions from members of the committee that we will submit to you in writing. Then if you could get back to us with written answers we would appreciate it.

Mr. Bendorf, Mr. Sales, thank you both very, very much for your participation in our efforts this morning. We greatly appreciate your testimony.

Mr. **Sales**. Thank you for the privilege and opportunity, Mr. Chairman.

Mr. **Bendorf**. Thank you.

Senator **Kasten**. Our next panel includes Mr. Mack, Mr. Sloane, Mr. Goetz, and Mr. Greenberg.

The first witness will be James Mack, of the National Machine Tool Builders Association. I understand that Mr. Mack is accompanied by Mr. Emmett McCarthy, who is the vice president in charge of product reliability, for Dreis & Krump Manufacturing Co.

Mr. Mack.

STATEMENTS OF JAMES H. MACK, PUBLIC AFFAIRS DIRECTOR, NATIONAL MACHINE TOOL BUILDERS ASSOCIATION, ACCOMPANIED BY EMMETT W. McCARTHY, VICE PRESIDENT, PRODUCT RELIABILITY, DREIS & KRUMP MANUFACTURING CO.; DAVID P. SLOANE, DIRECTOR, CONGRESSIONAL RELATIONS, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS, ACCOMPANIED BY PETER VOSS, JR., PRESIDENT, VOSS EQUIPMENT, INC.; HERBERT W. GOETZ, MANAGER, PRODUCT SAFETY, CINCINNATI, INC., ON BEHALF OF THE NATIONAL PRODUCT SAFETY LIABILITY COUNCIL; AND DAVID I. GREENBERG, LEGISLATIVE DIRECTOR, CONSUMER FEDERATION OF AMERICA

Mr. MACK. Thank you, Mr. Chairman.

You have heard earlier this morning from a representative of the American Trial Lawyers Association, who has suggested that uncertainty in the law is good and that consistency is not a virtue. Given the fact that 7 cents goes to attorneys for every 6 cents that goes to claimants, I would like to paraphrase Ralph Waldo Emerson and suggest that in Mr. Bendorf's case inconsistency is the last refuge of a voracious appetite.

Our view is, that in the area of product liability, the experimentation by courts and legislatures in 50 States has created an end result affecting interstate commerce that looks like it was evolved by Dr. Strangelove. And to present our side of the argument, NMBA will be represented by a small businessman from Chicago, Ill., Emmett McCarthy.

Mr. MCCARTHY. Mr. Chairman, our company, Dreis & Krump Manufacturing Co., has been in business since 1899. During those 85 years we have manufactured and sold about 50,000 press brakes, which are used by American industry to bend sheet metal. Some of the products made on our machines include the file cabinets and metal desks used in your offices; the elevator you rode up on this morning; the fluorescent light fixtures in this room; also the heating ducts in this room; also toasters, broilers, refrigerators, dishwashers, microwave ovens, vending machines, and all other metal products being bent.

Our press brakes vary in length from 3 to 58 feet, and in tonnage capacity from 10 tons of bending capacity to over 2,000 tons of bending capacity.

My own background in the metalworking industry goes back 40 years, with over 20 years in product safety activities. For the past 10 years, I have spent a substantial amount of time in the investigation, preparation and trial of product liability suits involving our company. Just this week I have been engaged and will continue to be engaged in two trials in New Jersey, one going on in Mount Holly and one in Jersey City.

I can tell you that, based on my background and experience, the crazy quilt of State laws and court decisions affecting product liability litigation promotes neither safety, technological innovations, equity, nor commonsense. It is a serious impediment to interstate commerce and threatens the very survival of my small company and others like it.

The only predictable element in the resolution of product liability disputes is that transaction costs resulting from uncertainty will continue to rise. Today, $7 is spent for lawyers for every $6 paid to claimants. This is wasteful, intolerable and unreasonable.

During this most recent fiscal year, our small company and its insurers paid out $850,000 for product liability claims. But only 18 percent of that amount went to pay settlements to claimants. About $700,000 went for defense lawyers and other transaction costs.

I firmly believe that a uniform set of balanced product liability rules would have saved our company and its insurers over 60 percent of the $700,000 we have expended. I also estimate that about $100,000 of the above would result in savings because of uniformity, thus eliminating the current need for our attorneys to research and brief conflicting laws in 50 States in an effort to persuade courts to change or sustain particular rules of law.

Second, many transaction costs will be eliminated, if the law is made more balanced and predictable. If everyone concerned—claimants, defendants, lawyers, judges, and manufacturers—know what the rules are, many claims without merit will never be started. Over the years we have lost only four verdicts out of the many claims that we have defended.

We average over $30,000 in defense costs on claims that proceed through trial. But we average about $5,000 in investigating and defending each claim we receive, regardless of the eventual disposition. We settle many of these claims for relatively small amounts of money, because it costs less to settle them than it does to defend them in court. If claimants and their lawyers knew in advance that they would be required to prove fault in design and warning defect cases—and if there were a reasonable period of repose for overage products—most of these claims would never be filed.

Let me give you two examples. We are being sued in Louisiana for an injury occurring on a 50-year-old machine we sold in 1932 for $703. It will cost us approximately $30,000 to defend this suit.

We are anticipating a suit in north central Wisconsin for an injury occurring when a management employee, the assistant safety director, was assaulted and his arm fed into a machine during a labor dispute.

Finally, the elimination of subrogation for workplace incidents will save us countless tens of thousands of dollars in transaction costs. More importantly, it would save untold human misery by encouraging employers to prevent accidents to employees.

The interaction between the tort and workmens' compensation systems has resulted in a situation in which an employer who fails to maintain a safe workplace can pass along his workmens' compensation costs to a product seller through the vehicle of subrogation, regardless of his fault. Over 80 percent of our claims are initiated or stimulated by the inequitable subrogation system.

Let me give you some examples. A woman in Iowa has no right hand because her employer failed to install safety devices that had been provided. The disconnected two hand operator controls were found in a cardboard box next to the machine.

A woman in Georgia was scalped because her employer, contrary to specific instructions chained to the machine, had disconnected the braking device and wedged down the foot pedal, so that the machine would operate continuously. This would be like disconnecting the brake on your automobile, wedging down the gas pedal while going downhill.

In addition, a 19-year-old girl in California is missing six fingers because her employer locked off the two-hand safety control that had been provided and told her to run a difficult operation using the foot switch, but without properly training her. She was injured 2½ hours after she started on the first day of work.

In each of these examples, a jury decided our machine's design was not responsible for the injury. But we had to spend tens of thousands of dollars in defense costs, because an unsafe employer had either dismantled or prevented the use of safety devices we had provided and had not properly trained the claimant in the safe operation of the machine. Most importantly, these women will be deformed for the rest of their lives because of unsafe working conditions.

Subrogation reform will help place greater incentives on employers to prevent industrial accidents, and it will eliminate transaction costs for the innocent sellers of industrial products. Our dilemma is not that we lose a lot of cases in the courtroom, but we get sued a lot. The current roulette wheel system has no stable rules and encourages a "sue and hope" syndrome.

Our written statement points out the differences between product liability and other forms of tort law and insurance.

Stabilizing the product liability law in my home State of Illinois only affects the claims that arise there. It does not affect claims arising in the other 49 States. The rules governing the disposition of these claims vary widely, sometimes resulting in direct conflict.

My written statement documents the 15-year history of the State by State passage of the Uniform Commercial Code, which still is not uniform, and most deviations arise in the State that generates the most commercial paper. Our small company cannot wait 15 years for the passage of uneven product liability legislation on a hit or miss basis by 50 State legislatures.

Our written statement points out the 6-year history of the Commerce Department and congressional study of the product liability mess, which culminated in last year's passage of the Risk Retention Act and in this committee's issuance of two tort law staff drafts and in these hearings.

A solution to the product liability mess can be accomplished only by the swift enactment of an equitable and well balanced Federal product liability tort statute. In conjunction with the Risk Retention Act passed last year under the leadership of you, Senator Kasten, and Senator Cannon, this tort law action will restore a large measure of predictability to product liability lawsuits. This will in turn result in a more rational and competitive product liability insurance market. And most importantly, the entire country, as well as the individual consumer, will benefit from a more innovative and productive manufacturing sector of the national economy.

Staff draft No. 2 accomplishes this goal with a limited form of Federal action that requires neither the creation of a new Federal agency nor the expenditure of Federal moneys. It adds no new basis for bringing actions in the Federal courts.

The balanced staff draft creates a set of product liability litigation rules that can be understood by everyone: product sellers, consumers, labor unions, managers, and most importantly, by judges and lawyers. It lets consumers know their legal rights and proposal sellers their obligations.

NMTBA will submit detailed section-by-section comments on staff draft 2 to the committee in the very near future.

In conclusion, let me reiterate and reemphasize the reality of the product liability mess confronting American manufacturers today. We believe the product liability mess to be a national problem which merits a national solution. Therefore, we urge this committee to enact the Uniform Product Liability Tort Law.

And I wish to personally thank you for the opportunity of appearing before this subcommittee. Thank you.

[The statement follows:]

STATEMENT OF EMMETT MCCARTHY, VICE PRESIDENT, PRODUCT RELIABILITY, DREIS & KRUMP MANUFACTURING CO.

I. INTRODUCTION

My name is Emmett McCarthy. I am Vice President, Product Reliability for Dreis & Krump Manufacturing Company. We are located in Chicago, Illinois, and employ approximately 180 workers. I am representing the National Machine Tool Builders' Association (NMTBA), a national trade association representing over 400 American machine tool manufacturing companies, which account for approximately 90 percent of United States machine tool production.

Although the total machine tool industry employs approximately 100,000 people with a combined annual output of around $5.1 billion, most NMTBA member companies are small businesses with payrolls of 250 of fewer employees.

While relatively small by some corporate standards, American machine tool builders comprise a very basic segment of the U.S. industrial capacity, with a tremendous impact on America. It is the industry that builds the machines that are the foundation of America's industrial strength.

We welcome the opportunity to assist this Subcommittee in its assessment of the product liability problem which confronts our nation's economy. In the case of the nation's machine tool builders, the judicial extension of liability for workplace injuries, beyond the employer to the manufacturer of industrial equipment, represents the most major impediment to interstate commerce.[1] As we will enumerate below, uncertainties in the area of product liability, inherent in any fragmented state-by-state approach, cause that impact. Therefore, we wish to focus your attention on the need for federal action in this area of critical importance to producers of manufacturing equipment.

We will begin our comments with a brief overview of product liability law (including the interrelationship of tort law and workers' compensation, intended only as an outline to serve as background for further discussion. We will also address the following: the interstate nature of the product liability problem and its effect on business and consumers; elements of concern to the machine tool industry and how they might be addressed within a federal framework; and Federal response to the problem, most recently, the Consumer Subcommittee staff draft outlining a uniform product liability law.

II. THE LAW OF PRODUCT LIABILITY—A BRIEF OVERVIEW

Dean Prosser in his classic work on torts defines product liability as "the name currently given to the area of case law involving the liability of sellers of chattels to third persons with whom they are not in privity of contract." [2]

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[1] See generally, the hearings from the 96th Congress on this topic. Supplemental hearing before the Subcommittee on Consumer Protection and Finance of the Committee on Interstate and Foreign Commerce, 96th Congress, Serial No. 96-204 (1980).

[2] W. Prosser, Law of Torts, 641 (4th ed. 1971).

A significant first aspect of the law of product liability to be considered is the multifacted relationships it encompasses. The injured person may be the buyer of the product manufactured by the defendant, or a family member for whose use the product was purchased, or an employee of the purchaser, or a "bystander", e.g., a pedestrian hurt due to the failure of an automobile part. Conversely, the defendant may be anyone in the chain of sale from the designer or manufacturer of a component part to the retailer of the entire product. Other variables also include the time between original purchase and sale, the conditions or use, and the opportunity for intervention by other parties or elements.

The evolution of product liability tort law has seen the pendulum swing from the theory of caveat emptor, ("buyer beware"), to manufacturer liability for "inherently dangerous" products; then to the imposition of liability for products which were negligently manufactured; and finally to the imposition of strict liability for injuries attributable to the manufacture and, in some jurisdictions, to the design or labeling of products.

Strict liability relies on the premise that the defendant may be held liable even though no wrongdoing has been alleged. The strict liability standard is unrelated to either wrongful intent or negligence. In the absence of recognizable fault, the liability in such cases is imposed on the party who, in view of the "exigencies of social justice, can best bear the loss." which effectively shifts the loss "by creating liability where there has been no fault."[3]

Over the years, then, the traditional rule of negligence has given way to the rule of strict liability in construction or express warranty cases. We do not oppose this. But the rapid development in the direction of imposing strict liability in design and warning defect cases is the most important underlying factor in the current product liability problem.

California and some other jurisdictions have shifted the burden of proof to product sellers in design cases where the plaintiff has introduced evidence that alternative designs were available. The manufacturer is liable for damages to any person who gets hurt by a product, whether or not the negligence of the manufacturer is alleged or proven.

California and some other jurisdictions have also expanded liability in various other ways. In reaction to this trend, various state legislatures have adopted legislation restricting claimants' causes of action and the time within which they must be brought.

The result is a crazy quilt of law which is constantly changing and which is totally upredictable by consumers, product sellers, and insurers.

The only predictable element in the resolution of product liability disputes is that transaction costs resulting from uncertainty will continue to rise. Today, seven dollars is spent for lawyers for every six dollars paid to claimants. This is wasteful, intolerable, and an unreasonable impediment to interstate commerce.

III. INTERRELATIONSHIP OF TORT LAW AND WORKERS' COMPENSATION

Workplace product liability is the area of greatest concern for our industry, and an issue of significant importance relative to the development of critically needed new technology.

In essence, what we have in the workplace is the collision of two trends of legal theory: workers' compensation—a self-contained no-fault system under which the injured employee receives benefits pursuant to a set compensation schedule, with the cost related to employees' benefits internalized by the employer as a cost of doing business; and traditional product liability tort law—a reparations system that is based upon the concept of responsibility for fault.

Under the current law, these two systems come into conflict everytime a workplace accident involving industrial machinery occurs. As one commentator has stated:

"The injured employee can file a claim under his state's workers' compensation program, but the amount of his recovery is specifically limited by statute. However, while he is barred by statute from bringing a lawsuit against his employer, he may seek additional recovery by bringing an action against a third party such as the manufacturer and/or seller of the machine or other product by which he was injured. The ability of the product manufacturer or other third party to defend himself and to seek to bring the employer into the action is directly controlled not by common law principles of negligence or strict liability, but by the workers' compensation statutes of the state in which the suit is brought. The interaction of these two systems—product liability and workers' compensation—directly affects the total costs and the allocation of the costs of the workers' compensation system." [4]

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[3] Pound, "The End of Law as Developed in Legal Rules and Doctrines", 27 Harvard Law Review, 195, 233 (1914).

This interaction between the two systems has resulted in a situation in which an employer who fails to maintain a safe workplace can pass along his workers' compensation costs to a product seller through the vehicle of subrogation, regardless of employer fault.

The vast majority of workplace injuries occur because of employer negligence rather than third party manufacturer fault. Nevertheless, this fact does not deter injured employees from filing third-party lawsuits in which they sue for money damages far in excess of statutory proscribed workers' compensation benefits. Most of these individuals have no concept of the slim chances of their winning. The facts are that today's product liability tort system benefits primarily the plaintiff's bar and the insurance industry (through enforcement of subrogation liens), and that the defense costs attributable to oftentimes meritless cases may cause a third-party defendant to lose his product liability insurance or abandon a product line.

It is evident, therefore, that escalating costs associated with workplace product liability have resulted in a system which impacts directly on many manufacturers who become indirect victims of the limitations inherent in the workers' compensation system. The machine tool industry provides a clear-cut illustration of this impact.

One-half of NMTBA members' lawsuits involve machine tools over 20 years old. Moreover, in only 13 percent of these workplace, product-related accidents could a feasible case be made that they were caused by mechanical failure or other alleged defect.

Fifty-eight percent of the claimants in these suits had been on the job less than six months. Sixty-five percent had received improper training from their employers of whom 63 percent had failed to guard their machine tools properly.

What these statistics show is that many machine tool builders are innocent third-party defendants in lawsuits involving injuries to novice, ill-trained machine tool operators whose employers, insulated by the workers' compensation system, have provided them with unguarded, over-aged machine tools.

The Insurance Services Office's (I.S.O.) survey of more than 24,000 product liability claims closed between July 1, 1976 and March 15, 1977 found that, although workplace injuries account for only 11 percent of the product liability accidents which result in claims payments, these incidents account for 42 percent of total bodily injuries payments. Moreover, the survey pointed out that approximately 58 percent of the total dollars paid for workplace accidents were in cases involving possible employer negligence, although the employer did not contribute to the payments.

Although the machine tool industry is presently defending a plethora of lawsuits, its courtroom record is quite impressive. In fact, of 212 closed claims reported in our 1981 survey, only 11 percent actually reached trial. Of these, our members won 88 percent.

In other words, less than 2 percent of the total number of products liability claims have resulted in verdicts against our members—an accumulated average courtroom loss of $195,700. Sixty-one percent (61%) of the claims are settled for an averge of $31,300; 10 percent are won by our members in the courtroom; and the remaining 28 percent are dropped without awards being paid.

Our dilemma, then, is *not* that we lose a lot of cases in the courtroom, but that we get sued a lot. The current roulette wheel system with no stable rules encourages a "sue and hope" syndrome. The quantity of product liability lawsuits (not the quality of our products) had persuaded many product liability insurers in the late 1970's either to abandon the field or to charge high premiums unrelated to the insured's individual claims experience.

The very high transaction costs associated with product liability lawsuits, together with the trend toward imposing liability on product sellers in design defect and "failure to warn" cases *without proof of fault* will continue to increase insurance costs in the absence of comprehensive remedial legislation on the federal level.

IV. PRODUCT LIABILITY: A TWOFOLD PROBLEM IN NEED OF A TWOFOLD SOLUTION

We have noted that a significant aspect of product liability law is the multifaceted relationships it encompasses. It follows, then, that the product liability problem is a multifaceted one, a finding documented by the Commerce Department in its exhaustive two-year study of the product liability "mess." The Department determined that the problem is caused *both* by uncertainties and imbalance in the litigation system (unavoidable in the absence of a uniform standard) and by insurance ratemaking difficulties.[5]

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[4] Weisgall, "Product Liability in the Workplace: The Effect of Workers' Compensation on the Rights and Liabilities of Third Parties", 1977 Wisc. L. Rev. 1035, at 1036 (1977).

With regard to the latter aspect of the problem, this Committee's initiative, led by Senator Kasten, resulted in last year's passage of the Risk Retention Act, designed to provide an equitable market solution to the problem of affordable product liability insurance coverage.[6] Our association currently has a feasibility study underway to determine the best course of action for our members in light of the Risk Retention Act.

Risk Retention is a vital response to the product liability insurance affordability/availability problem. However, we must point out that this is only a partial, albeit very important, solution to the overall product liability crisis.

Congressional passage of a uniform product liability law—one that provides predictability and puts to rest the possibility that tort law will be turned into a compensation system—is necessary. The Risk Retention Act will assure that the benefits of your action on tort legislation will flow to those for whom these benefits are intended. No further action is necessary to resolve the insurance aspect of the product liability problem.

V. THE INTERSTATE NATURE OF THE PRODUCTS LIABILITY CRISIS MANDATES A FEDERAL SOLUTION

It is suggested by some that due to the traditional common law development of product liability jurisprudence, any attempt to provide uniformity in product liability tort law should be made on a state-by-state basis, in a manner similar to the adoption of the Uniform Commercial Code (UCC).

Certainly, we recognize that there are benefits to be derived from such a procedure. Presumably, it would allow for tailor-made approaches to unique problems and concerns of individual states. Furthermore, it would foster a degree of variation between the several states' treatment of problems common to all. The results of such differing solutions to common difficulties could then at a later date be analyzed and compared, with the advantages and disadvantages of the various approaches more clearly identified for all to evaluate.

However, having stated the merits of a state-by-state approach to the law of product liability, we, nevertheless, believe that a uniform federal approach to product liability tort law modification is required for two very significant reasons.

First, the geographical distribution and interstate flow of products are distinguishing features of the product liability problem. Unlike the intrastate complexion of medical malpractice for instance, where it is typically true that the state of the practitioner's place of business or residence, the state of the injury, and the state of the victims' residence are all the same, product liability is much more complex. Although a manufacturer may have facilities in only one state, his product is sold throughout the country via numerous distribution networks.

Therefore, stabilizing the law in the manufacturers' home state only affects claims that arise there. It does not affect claims arising in the other 49 states. The rules governing the disposition of these claims vary widely, sometimes resulting in direct conflict.

A transcontinental railroad provides a good analogy. The train departs California for an ultimate destination in Illinois, passing through numrous states enroute. If each of those states independently imposed regulations regarding the number of freight cars permitted on the train as it passed through only that state, the obvious result would be chaos. Our members confront similar chaos in the application of product liability tort law on a state-by-state basis.

For example, although a majority of the states require proof of fault before the imposition of liability for defects in design, some jurisdictions do not impose a fault standard. And in California, it is not even necessary to prove that the defendant manufactured the product.

This variance in state law precludes insurers from being able to accurately predict potential risks associated with the product sellers they insure. As a result, they set their rates conservatively in the event that an insured experiences a "worst case" liability in a minority view jurisdiction. Therefore, we firmly believe that the potential nationwide impact of product liability mandates a federal remedy.

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[5] See generally Interagency Task Force Final Report, U.S. Department of Commerce (1977).

[6] Public Law 97-45, 97th Cong., 1st Sess.

Second, on a very pragmatic level, we greatly fear that the philosophical and theoretical satisfaction to be derived from the modification of tort law on a state-by-state basis would very likely come at the financial hardship of many of our members and other product sellers. As one observer has noted: "It is unlikely that insurance premiums calculated by companies doing business on a nationwide basis will be significantly reduced by piecemeal enactments." [7] Rather, these manufacturers will continue to have to pay very high product liability insurance premiums, or in some of the most extreme cases, may actually be bankrupted by astronomical product liability judgments for which they were unable to obtain insurance coverage, while they wait for their individual state legislatures to get around to enacting "uniform" tort law modifications.

Moreover, even if it were possible for products manufacturers to endure such a protracted and torturous process of state-by-state enactment of product liability tort law modifications, we wonder what the final results of such a process would be. Since critics of federal preemption like to point to the state-by-state adoption of the UCC as a more satisfactory method of achieving jurisprudential uniformity, perhaps it behooves us to take a closer look at exactly what the results of that exercise have been.

Today the UCC (1962 Official Text) with variations, is law in all states but Louisiana and is also law in the District of Columbia and the Virgin Islands.

Unquestionably, the UCC originally conceived in 1940 by Mr. William A. Schnader, President of the National Conference of Commissioners on Uniform State Laws, stands as a monument to the tireless efforts of many leading legal scholars in their attempt to bring unformity to important areas of the commercial law. However, it is a monument not without its flaws.

The National Conference of Commissioners was the originating sponsor of the Code. However, this was not the first venture of the conference into the field of commercial law reform. The conference had earlier sponsored a number of "uniform acts" in fields of commercial law ranging from sales to negotiable instruments, but, by the late 1930's it became apparent that the acts had become outdated as a result of the emergence of new patterns of commercial activity. Moreover, by that time it was clear that one of the major objectives of the "uniform acts" had not been achieved. That is, the uniformity which had been sought had been thwarted by the fact that not all states enacted the acts. And in those states that had incorporated the uniform acts into their law, state courts rendered countless nonuniform "judicial amendments." Against this background the UCC was developed.

Although eventually almost every state adopted the UCC, in contrast to the relative lack of support for the earlier acts, it was far from being an overnight process. In 1953, Pennsylvania became the first state to enact the model business code. A full decade later only slightly over half of the states had followed suit by adopting some form of the UCC. And, New York, a major commercial center, had been one of the last of these states to accept the uniform law. Finally, by 1968, a full fifteen years after the process had begun, the UCC was in effect in every state but Louisiana, as well as the District of Columbia and the Virgin Islands.

So, the UCC had succeeded in a vital area where its predecessor "uniform acts" had failed, that is, being adopted in nearly every jurisdiction in the union. However, surely this protracted process was not without its inconvenience to the flow of commerce. And we are certain that the luxury of such a state-by-state process, lasting for over a decade and a half, is certainly one that is quite literally unaffordable for many of our members today.

Furthermore, the Uniform Commercial Code was not literally uniform in all of the various states. By 1967, the various jurisdictions enacting the code had made approximately 775 separate amendments to it. Moreover, some of the states that most liberally rewrote or deleted sections of the UCC were the very states that conducted a large share of the business to which the code's concepts were applicable. For example, New York amended article five in a manner that renders it inapplicable to many letter of credit transactions, even though New York does more letter of credit business than any other state. California was also a principal offender against the UCC's goal of uniformity.

Another problem which is beginning to arise with the UCC, and which would also undoubtedly occur with a state-by-state approach to product liability tort law modification as well, is that of varying judicial interpretation.

It is, of course, not unusual for laws, which necessarily must, to one degree or another, contain "open-ended" phraseology, to receive somewhat varied judicial interpretation. That different courts will give such phrases different meanings should surprise no one. Moreover, after any uniform law has been on the books for a while, disparate judicial interpretations and constructions will inevitably become a source of nonuniformity.

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[7] Phillips, "An Analysis of Proposed Reform of Product Liability Statutes of Limitations," 56 North Carolina Law Review, 664, 672 (1980).

Certainly this has been the case in the approximately 31 states which have passed some limited form of product liability statute. For the most part, these statutes fail to provide a consistent outline for the most basic elements of product liability claims. Rather, state courts have proceeded in a variety of directions concerning fundamental issues in product liability tort law. For example, states maintain divergent views on these very basic issues: (1) whether the plaintiff must show that the defendant manufactured the product in question; (2) whether purely economic losses are recoverable under a tort theory (as compared to commercial law); and (3) whether the plaintiff can introduce evidence of post-manufacture design improvements in product safety to establish that the product in question was unsafe.[8]

Disparate judicial interpretations, inherent in a state-by-state product liability litigation system, result not only in uncertainty, but also a fundamental imbalance in the law. The nature of interstate commerce dictates that judicial decisions in minority view states that are unquestionably out of synch with traditional and longstanding interpretations or product liability law carry with them a potential nationwide impact. Ultimately, this situation fails to provide adequate incentives for accident prevention where they will do the most good.

In addition, states frequently have side-stepped basic philosophical and jurisprudential issues (including fault and compensation) deserving of considerable attention. As a result:

> The treatment of these issues by state appellate courts generally has been unilluminating . . . the opinions tend to be conclusory and founded upon unarticulated rationales. Although it is not uncommon for decision makers to focus upon simplistic and readily comprehensive analysis, such reasoning frequently results in unsatisfactory opinions.[9]

However, it would be possible to reduce significantly the extent of this type of "judicial legislation" by establishing a uniform legislative history. Federal enactment of a product liability law would provide such a common background to which courts could refer when rendering an interpretation of the statutory language; adoption on a state-by-state basis would not.

Even more distressing, as in the case of the UCC, many states may not even hold hearings or publish reports, and therefore will fail to provide interpreting courts with any legislative guidance at all. Faced with such a situation, courts will inevitably fall back upon their particular state's common law tort jurisprudence as a source of guidance.

With this "judicial legislation" occurring in numerous jurisdictions across the country, it may not be long before the uniformity which we have so arduously worked to achieve will be lost, and we will find ourselves in no better circumstances than the present situation.

Finally, there is a fundamental qualitative difference between what the UCC was designed to accomplish and what the primary objectives of a uniform product liability act are, which allows the UCC to function in spite of the attenuating pressures of nonuniformity, but which would completely thwart the objectives of uniformity in product liability law. That basic distinction is simply but significantly the fundamental legal dichotomy between contract and tort.

The UCC is designed to operate in the area of commercial transactions where the involved parties exist in arms length business relationships, into which the parties have entered with conscious intent. By contrast, a uniform product liability act would necessarily have a function in the area of tort law, which has as its objective the compensation of parties for damages which are obviously not planned, and are very often quite unpredictable.

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[8] Some states have circumvented a traditional rule of product liability tort law requiring the plaintiff to prove that injury was caused by defendant's product. (Sindell v. Abbott Laboratories, Inc., 26 Cal. 3d 588, 607 P. 2d 924, cert. denied, 499 U.S. 912 (1980).) In addition, while traditional tort law has addressed only personal injuries and property damage, appropriately leaving purely economic losses to commercial law, some jurisdictions have expanded tort claims to include economic losses. (Schiavonne Constr. Co. v. Elgood Mayo Corp., 2 Prod. L. Rptr. P. 8981 (N.Y. App. Div. 1981).) Lastly, several states have ignored the traditional tort rule prohibiting plaintiffs from introducing evidence pertaining to the defendant's new safety improvements to illustrate that older products were unsafe. (Caprara v. Chrysler Corp., 423 N.Y.S. 692, aff'd., 52 N.Y. 2d 114, 417 N.E. 2d 545 (1981).)

[9] McGovern, "The Variety, Policy and Constitutionality of Product Liability Statutes of Repose," 30 American U. Law Review, 579, 581 (1981).

This basic dichotomy between consciously planned contractual relationships on the one hand, and involuntary and unpredictable tortious interactions on the other, is made more evident by the fact that the UCC itself contains a conflict of laws section (§ 1-105) which permits the contracting parties in most cases to select beforehand which forum's law will govern their agreement. By contrast there is certainly no way for product liability defendants to predetermine which state's tort law will apply since there is no way of predicting in which jurisdiction a tortious injury may occur. Indeed, in most cases there does not even exist a legal relationship between the plaintiff and the defendant prior to the time of the purportedly tortious injury.

Therefore, because of the potential for product liability suits to unpredictably arise in numerous and diverse jurisdictions, it is vital that the pressures of nonuniformity be kept to a minimum in the enactment of product liability legislation. Indeed, in the case of capital goods used in the industrial workplace, nonuniformity in only a relatively few states may be extremely detrimental to the ultimate goal if those states happen to be highly industrialized and are the situs of the bulk of industrial workplace accidents.

Finally, uniformity in product liability tort law, and hence greater predictability of the outcome of such litigation, is of vital importance not only to plaintiffs and defendants in such cases, but also to insurance companies which base thier premiums for underwriting product liability insurance coverage on the statistical probabilities of such claims experience.

We have established that just as Risk Retention and tort law modifications separately are important specific remedies to two component causes of the overall problem, the interrelationship of these two responses is also a critical factor in the ultimate intergrated solution to the product liability crisis. Just as the many facets of the problem are interwoven, so too must be any solution which hopes to be effective. The hodge podge of state laws simply does not get the job done.

Therefore, there is certainly much to be said for the proposition that a federal statute which arrests development of compensation-system oriented trends in product liability tort litigation law; "smoothes out" (i.e., overturns) exotic state court decisions in some so-called "leading jurisdictions," which have givern rise to those trends; and which corrects some of the more egregiously unfair aspects of the current state of the law as it is interpreted in most jurisdictions will do much to provide a climate in which our members can protect themselves with affordable products liability insurance. The Risk Retention Act will then assure that these changes in tort law will be reflected in lower product liability premiums for product sellers.

VI. FEDERAL PRODUCT LIABILITY INITIATIVES—AN OVERVIEW

Any discussion concerning the propriety of a federal forum for product liability legislation should include a review of previous federal initiatives in the area of product liability tort law modification.

In 1976, the Ford Administration commissioned a federal Interagency Task Force to evaluate the causes and effects of the product liability crisis. It was continued under President Carter's Administration. As mentioned previously in this statement, the Task Force identified insurance ratemaking difficulties and uncertainties in the tort litigation system as fundamental causes of the problem. With regard to the latter finding, the Department of Commerce recomended that a model uniform product liability statute be established, presumably for enactment at the federal level. Following extensive public comment and review, the model Uniform Product Liability Act (U.P.L.A.) was issued in 1979.[10]

Although a federal remedy had been chosen as the most effective means of dealing with the insurance ratemaking, the Carter Administration decided to offer the U.P.L.A. as a basis for *state* action. It was subsequently distributed to the appropriate committees of all the state legislatures, as well as to each governor. This far, no state has adopted the entire model act. In fact, as Commerce Secretary Baldrige has recently observed, "the problem of uniformity among the states has become even more pronounced . . . it appears that uniformity [among the states] will be very slow in coming—if it comes at all."[11]

Congressional initiatives in the 96th Congress saw the introduction of various product liability bills in the House. Most notable in terms of the interest they generated were H.R. 5626 and H.R. 7000, which was a federal version of the Department of Commerce Uniform Product Liability Act. More than a dozen public hearings resulted in widespread and comprehensive analysis of the entire product liability problem, and culminated in the introduction of H.R. 7921 by leading members of the House Commerce Committee in the closing days of the session. H.R. 7921 was an amalgam of the two earlier bills, coupled with what was learned by the Commerce Committee during the hearing process.

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[10] The Department received more than 1,500 pages of comments in 240 separate communications.

[11] Speech by Secretary of Commerce Malcolm Baldrige, Workers' Compensation and Workplace Liability Conference, Washington, D.C., May 27, 1981.

Interest in the product liability problem has continued in the 97th Congress. Recognizing the need for a federal legislative remedy to the product liability problem, Senator Robert Kasten, Chairman of the Commerce Consumer Subcommittee, directed the Committee staff to prepare a bill establishing uniform rules of liability. The staff's first working draft was circulated for public comment last October. Public response to the draft was extensive. The staff's subsequent revision (Staff Draft No. 2) will be the focus of our comments later in this statement.

In addition to the examination of the product liability crisis currently taking place in the Senate, the House of Representatives also appears to be moving towards active consideration of federal product liability tort reform. Congressman John Dingell, Chairman of the Committee on Energy and Commerce, has indicated his interest in the subject. Congressman Henry Waxman, Chairman of the Commerce Subcommittee on Health, intends to convene hearings on the issue sometime this spring and has directed his staff to draft legislation for those hearings.

Our point here is that the need for product liability tort modifications has been recognized for some time. This area of the law has been subject to scrutiny by the government, by the business community and by consumer groups. In short, federal product liability tort reform is an idea whose time has come.

VII. OPTIMAL CONTOURS OF FEDERAL PRODUCT LIABILITY LEGISLATION

Before commenting specifically on Staff Draft No. 2, we would first like to briefly outline what we consider to be the optimal contours of a uniform product liability statute. In arriving at this position we should emphasize that we have taken into account both what we believe to be politically feasible as well as substantively necessary at this point in time.

Obviously, any proposal would have to be drafted in a fashion which would balance the various competing interests in a manner politically palatable to Congress, which must necessarily represent many diverse interests.

We believe that an act which incorporates provisions that address at least those issues listed below would be a major step in the right direction.

First, the act should provide for an appropriate allocation of fault in design defect and "failure to warn" cases. The use of a fault standard within *both* contexts would clearly indicate that we are working within the confines of a liability, not a compensation system. Such clarification is, without question, a necessity. It is essential to note here the distinction between manufacturing defects and express warranty cases and design defect and "failure to warn" cases. The former two are governed in most, if not all, states by a strict liability standard. This is as it should be and the staff drafts codify strict liability in manufacturing defect and express warranty cases.

Although the tort system was created to fairly allocate liability on the basis of fault, it has evolved into a system which, in some jurisdictions, has eliminated fault as a consideration. In these jurisdictions, all that is required to establish liability is a causal relationship between a product and an injury. This imbalance must be corrected and the act should codify the view that design and "failure to warn" cases should be governed by a fault-based standard. The staff drafts accomplish this objective.

A second and related provision should require proof that the defendant actually manufactured or designed the product in question—not another person, not the government, but that the defendant manufactured or designed the product.

Thirdly, product sellers should be held to a standard of conduct consistent with practical technological feasibility at the time of manufacture. The tendency of some courts to impose 20-20 hindsight should be eliminated.

A critical element in the conceptual framework of product liability is that of subrogation. We believe a uniform product liability act should eliminate subrogation of workers' compensation claims and automatically reduce a plaintiff's award in workplace cases by the amount of compensation. This would cut down transaction costs and would provide at least a rough cut of justice, which the law in most states today does not provide with respect to the relationship between employers and product sellers in workplace incidents. The law ought to provide for a system of comparative fault in the workplace and in other product liability litigation and assure that if persons misuse or modify a product, their conduct will be taken into account in the imposition of liability and/or damages.

One of the major contributing factors in the product liability "mess" from our industry's perspective is the fact that machine tools enjoy such longevity of use in the industrial workplace. Because of this, it is not uncommon for a manufacturer to be sued for an accident which occurred today on a machine produced over one-half a century ago, and which the machine tool builder does not even know is still in existence.

To continue to hold manufacturers liable for accidents that occur on any machine they have ever produced, regardless of its age, or more importantly, regardless of the practical technological feasibility at the time the machine was built, seems inequitable.

The law should codify the overwhelming majority view that actions for economic loss, unrelated to personal or property damage, are not product liability actions and must be brought under the Uniform Commercial Code.

It should also clarify that proof of or acceptance of liability in one product liability action does not set up a domino effect, permitting a judicial assessment of liability in all future unrelated actions involving other claimants.

Finally, the law ought to eliminate—as the overwhelming majority of states now do—the ability of the plaintiff's lawyers to introduce post-manufacture design changes into evidence for purposes of proving that the design of the product was defective in the first place. The barring of such evidence is a time-honored tradition in tort law, which has long held that such evidence is irrelevant.

VIII. STAFF DRAFT NO. 2

We commend Senator Kasten on his broad-based understanding of the product liability crisis. His introduction of the Risk Retention Act last year, followed by this current effort to stabilize product liability tort law, presents a timely opportunity for Congress to bring certainty and uniformity to consumers and product sellers alike.

Staff Draft No. 2 accomplishes this goal with a limited form of federal action that requires neither the creation of a new Federal agency nor the expenditure of federal monies. It adds no new basis for bringing actions in the federal courts.

The balanced staff draft creates a set of product liability litigation rules that can be understood by everyone: product sellers, consumers, labor unions, managers, and—most importantly—by judges and lawyers. It lets consumers know their legal rights and product sellers their obligations.

NMTBA will submit detailed section-by-section comments on Staff Draft No. 2 to the Committee in the near future.

IX. CONCLUSION

The solution to the product liability mess lies with the swift enactment of equitable and well balanced federal product liability tort law modifications. In conjunction with the Risk Retention Act passed last year, this action will restore a large measure of predictability to product liability jurisprudence, which will in turn result in a more rational and competitive product liability insurance market. But most importantly, the entire country, as well as the individual consumer, will benefit from a more innovative and productive manufacturing sector of the national economy.

In conclusion, let us reiterate and reemphasize the reality of the product liability crisis confronting American manufacturers today. We believe the product liability mess to be a national problem which merits a national solution. Therefore, we urge this Committee to enact a uniform product liability tort law.

Thank you for the opportunity of appearing before this Subcommittee. We would be happy to respond to any questions you might have.

Senator **Kasten**. Mr. McCarthy, we thank you. I might just add that your statement provides this committee with the kind of information and the kind of practical day-to-day facts that I hope we will take it into consideration as we work toward some kind of a resolution of these important problems. So I greatly appreciate your testimony.

The next witness is David P. Sloane, National Association of Wholesaler-Distributors, accompanied by Peter Voss. Mr. Sloane.

Mr. **Sloane**. Thank you, Mr. Chairman.

My name is David P. Sloane. I am director of congressional relations for the National Association of Wholesaler-Distributors. With me this morning is Mr. Peter W. Voss, Jr., president of Voss Equipment, Inc., a small material handling company operating in the Chicago area. Also, to provide a little bit of legal advice if it be necessary, Mr. George Keeley is behind us. He will be appearing on the next panel.

Before I turn it over to Mr. Voss, let me briefly describe NAW, the wholesale distribution industry and its involvement in the product liability issue. NAW is a federation of 121 national wholesaler-distributor trade associations which have a collective membership of 45,000 firms nationwide, with 150,000 business locations. The members of our affiliate organizations are responsible for over 60 percent of the $1.2 trillion of merchandise which flowed through wholesale distribution channels in 1981. NAW members wholesale and distribute every conceivable type of consumer and industrial product, from sporting goods to heavy machine tools.

Our involvement in the product liability area began in the mid-1970's. The growing application of strict liability, as Mr. Sales pointed out, to wholesaler-distributors fostered an intense legislative campaign on the part of NAW to resolve the product liability problem. In 1977, the association launched a massive grassroots State product liability effort. Wholesaler-distributor task forces were formed in 33 States to petition the legislatures to enact tort legislation. Our efforts, in combination with those of manufacturers, resulted in passage of 28 State statutes, 14 of which contain provisions limiting the liability of nonmanufacturing product sellers to their own negligent actions, of critical importance to our industry, obviously.

As a result of those initiatives, however, we became firmly convinced that State reforms would not produce the uniformity needed to restore certainty and predictability to the conduct of interstate commerce. Preemptive Federal legislation, establishing clear and uniform standards, is the only way to accomplish this objective.

Chairman Kasten, your efforts in the product liability area have been deeply appreciated by the wholesale distribution industry. Your championship of the NAW-supported Risk Retention Act was the first critical step in resolving the product liability problem at the Federal level. As a followup to your initiative, I am happy to report that NAW is rapidly moving ahead with plans to establish one of the first such risk retention groups for utilization by our industry.

As you now begin to look at the complex tort litigation problem, we believe that Mr. Voss will be a useful witness to your inquiry. The case he will discuss this morning clearly illustrates the inequities of the present legal situation for nonmanufacturing sellers.

Let me now turn it over to Mr. Voss, and thank you, Mr. Chairman.

Mr. KASTEN. Thank you, Mr. Sloane.

STATEMENT OF PETER VOSS, PRESIDENT, VOSS EQUIPMENT, INC.

Mr. VOSS. My name is Peter Voss, Jr. I am president of Voss Equipment of Chicago, Ill. My father started our business in 1940 and we have been supplying material handling equipment, lift trucks, to industry since that time. We are a small business, employing 56 people, with gross annual sales of $8.8 million.

I sincerely appreciate the opportunity to appear before this subcommittee as it looks into the need for resolving the growing product liability tort litigation problem.

While I know that this subcommittee and its chairman have been commended for their leadership in enacting the Risk Retention Act, I would like to offer my own personal thanks for making this concept a reality. With this new law on the books, the insurance element of the product liability problem has been resolved through a creative and effective marketplace solution.

I am glad Congress has begun to examine the serious tort litigation problem. As a veteran of the Illinois product liability reform campaign, I do not believe this problem can be resolved at the State level. Under this approach uniformity, predictability, and stability will never be achieved. Only a uniform Federal law can address the unique interstate nature of this problem and provide product sellers and product users with a consistent understanding of their responsibilities.

I do not mind telling the subcommittee I am scared. The specter of a devastating product liability case haunts my business on an almost daily basis. A pending case involving a fellow Pennsylvania material handling equipment distributor is a prime example. The distributor did not sell the truck to the user, nor control its use. Yet an $18.8 million judgment was just rendered against him and the manufacturer. If this decision holds, it will more than likely wipe the distributor out of business.

While I am here today to talk about my own product liability problems, my statement reflects the serious concerns of thousands of other wholesaler-distributors throughout the country. For our industry, today's maze of product liability laws represents an utter lack of control over circumstances which give rise to liability, the lack of uniformity; and lack of equity and common sense.

Let me share with the subcommittee the details of a product liability case involving my company that I believe will illustrate some of our industry's problems. Fortunately, this has been the only major product liability case involving a piece of Voss equipment thus far. However, given the lottery-like nature of the present system, it may well happen again, and I will have absolutely no control over its occurrence.

In this case, my company leased a fork truck to a steel company. In this particular company the truck was being used to transport heavy steel door frames from one part of the facility to another. As it happened, a man who had been with the company for several years was just transferred to this assignment to avoid layoff as a result of company cutbacks. He received no formal training in the operation of the equipment and later admitted that he had not been instructed on proper loading procedures.

On the morning of his first day of independently operating the truck, not more than 1 hour after he had set to work, an accident occurred. He had improperly stacked a load of heavy steel door frames in the upright position on the truck. When the operator went to remove 1 door, the other 12 on the truck tipped over and fell on him. He sustained relatively serious injuries as a result.

Voss Equipment was not even informed of the accident until the following summer, months after, when we received notice of a product liability action. The employee was suing our company and the lift truck manufacturer for damages of $775,000. The manufacturer quickly settled out of court.

Since I had product liability coverage, my insurance company handled the case entirely for me. Upon reviewing the circumstances, they settled out of court for $165,000. They knew the dangers of risking a jury trial, given the trend in strict liability judgments against wholesaler-distributors.

I place the blame for my situation on the current legal system. The current situation imposes an impossible burden on the non-manufacturing seller. It assumes that we can control the actions of product users to insure safe and proper use of our products. This is not possible. We do not make the trucks we sell and lease. We cannot drive them for our customers. We cannot keep constant watch over their use. A fork truck is a big, heavy, and potentially dangerous machine if used improperly.

I would conclude by saying that if my negligent handling of a product causes an injury I am prepared to assume full responsibility for those actions. That is why I have product liability insurance. But to hold me strictly liable for the negligent actions of others is simply not fair. I cannot afford that and my insurer cannot adequately insure that kind of liability.

I am not a deep pocket, nor are other wholesaler-distributors. We are small businessmen. My company operates on a very limited profit margin.

Mr. Chairman, I commend you for holding these critical hearings and urge you to move ahead with all due speed in the consideration and enactment of a uniform Federal product liability law.

Thank you.

[The statements follow:]

STATEMENT OF DAVID P. SLOANE, DIRECTOR, CONGRESSIONAL RELATIONS, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS

Mr. Chairman, Members of the Subcommittee. My name is David P. Sloane and I am Diretor-Congressional Relations for the National Association of Wholesaler-Distributors (NAW).

Accompanying me this morning is Mr. Peter W. Voss, Jr., President of Voss Equipment, Inc., Harvey, Illinois. He is a member of the Material Handling Equipment Distributors Association, an affiliate association of NAW. Voss Equipment is a small material handling equipment distribution firm which sells and leases fork lift trucks and other material handling equipment to industry.

Mr. Voss is well qualified to present the wholesale distribution industry's views with regard to the tort litigation system and the need for federal legislation.

The case he will discuss this morning clearly illustrates the inequities of strict liability for non-manufacturing product sellers. As an activist during the Illinois state product liability reform campaign, he can also offer valuable insights on the limitations of the state-by-state approach.

Congress has made important progress in resolving the product liability problem. Passage of the NAW-supported Risk Retention Act (PL 97-45) in 1981 provided an innovative and useful solution to the insurance component of the problem. Chairman Kasten, your championship of this statute is deeply appreciated by the wholesale distribution industry and countless others in the product seller community. As a follow up, I am happy to report to you that NAW is rapidly moving ahead with plans to establish the first risk retention group for utilization by our industry.

The next and most critical phase of reform will be to resolve uncertainties in the tort litigation system through enactment of a uniform federal law. The development of Staff Working Drafts 1 and 2 shows important progress in that regard already. We urge you to proceed with that critical process and look forward to working with you on this in the months ahead.

ABOUT NAW AND THE WHOLESALE DISTRIBUTION INDUSTRY

The National Association of Wholesaler-Distributors is a federation of 121 national wholesaler-distributor trade associations (see attached list) which have a collective membership of approximately 45,000 firms nationwide, with 150,000 places of business.

The members of our affiliate associations are responsible for over 60 percent of the $1.2 trillion of merchandise which flowed through wholesale distribution channels in 1981.

The industry employs approximately 3 million of the 5.4 million Americans working in wholesale trade in stable, high-paying year-round employment.

Merchant wholesaler-distributors perform an essential economic function. They make goods and commodities of every description available at the place and time of need. Wholesaler-distributors purchase goods from producers, inventory these goods, break bulk, sell, deliver and extend credit to retailers and industrial, commercial, institutional, governmental and contractor business users.

Wholesaler-distributors are essential to the efficient satisfaction of consumer and business needs. Further, by the market coverage which they offer smaller suppliers and the support which they provide to their customers, wholesaler-distributors preserve and enhance competition, the critical safeguard of our economic system. According to an NAW survey, the typical wholesaler-distributor established market connections between 133 manufacturers and 533 business customers. Many of these manufacturers are themselves small businessmen who must rely on wholesaler-distributors to establish, maintain and nurture markets for their products. The majority of customers are small businessmen, also, who look to the merchant wholesaler-distributor to provide merchandise availability, credit and other critical services.

WHOLESALE DISTRIBUTION INDUSTRY INVOLVEMENT IN PRODUCT LIABILITY

NAW members wholesale and distribute every conceivable type of consumer and industrial product, from sporting goods to heavy machine tools.

The doctrine of strict liability, through the evolution of case law over the past two decades, has eroded many of the traditional concepts of equity in tort law. This evolutionary process is transforming the tort litigation system into a compensation mechanism and away from its traditional function of determining and allocating fault. The increasing involvement of wholesaler-distributors in product liability actions resulting from factors beyond their control illustrates the trend away from fault.

In response to the inequity of strict liability, NAW launched a massive grassroots-oriented state product liability campaign beginning in 1977. Wholesaler-distributor product liability task forces were formed in 33 states to petition legislatures to enact tort legislation. Our efforts, in combination with those of manufacturers, resulted in passage of 28 state statutes, 14 of which contain provisions limiting the liability of non-manufacturing product sellers to their own negligence, of critical importance to our industry.

As a result of those initiatives, however, we are now firmly convinced that state reforms will not produce the uniformity needed to restore certainty and predictability to the conduct of interstate commerce. Preemptive federal legislation, establishing clear and uniform standards, is the only way to accomplish this objective.

STATEMENT OF PETER VOSS, PRESIDENT, VOSS EQUIPMENT, INC.

My name is Peter W. Voss, Jr. I am President of Voss Equipment, Inc. of Harvey, Illinois—a suburb of Chicago. My father started this business in 1940, and we have been supplying material handling equipment to business and industry in the Greater Chicago area since then. We are a small business, employing approximately 56 people, with gross annual sales of $8.8 million.

I sincerely appreciate the opportunity to appear before this Subcommittee as it looks into the need for resolving the growing product liability tort litigation problem.

While I know that this Subcommittee and its Chairman have been commended for their leadership in enacting the Risk Retention Act (PL 97-45), I, nonetheless, want to offer my own personal thanks for making this concept a reality. With this statute now on the books, the insurance element of the product liability problem has been resolved through a creative and effective marketplace solution.

I can tell you in no uncertain terms that I am glad Congress has finally begun to examine the tort litigation issue. As a veteran of the Illinois' product liability reform campaign, I don't believe the state-by-state approach will produce the necessary results: uniformity, predictability and stability. The states will not enact the same or similar laws (this is already proving correct); product sellers will not obtain the predictability they need to sell their products with knowledge of their full responsibilities; and the law will continue to expand and change, constantly redefining the limits of liability for wholesaler-distributors and others. Only a uniform federal law can address the unique interstate nature of this problem.

I don't mind telling this Subcommittee I am scared. The specter of a devastating product liability case haunts my business on an almost daily basis. A pending case involving a fellow Pennsylvania material handling equipment distributor is a prime example. The distributor never had possession of the forklift, nor control over its use. Yet an $18.8 million judgment was just rendered against him and the manufacturer. While the case is now on appeal, if the decision holds, it will more than likely wipe that company out.

This is not an isolated example of the inequities of the product liability system for wholesaler-distributors. These very real problems exist in a number of the commodity lines, ranging from industrial distribution to pharmaceutical wholesaling. While I am here today to talk about my own product liability problems, my statement reflects the serious concerns of thousands of other wholesaler-distributors throughout the country. For our industry, given the current state of the law, product liability means lack of control over circumstances which give rise to liability, lack of uniformity and lack of equity and common sense.

I am particularly heartened by the recent work of this Subcommittee in developing Staff Working Drafts No. 1 and No. 2. As I understand it, these proposals contain many, if not most, of the basic components needed to address the tort litigation problem in a comprehensive and fair manner. The primary thrust of these legislative proposals is to clarify the law and place it on a fault basis. Nowhere is the burdensome inequity of strict liability more apparent than when applied to wholesaler-distributors.

Let me share with this Subcommittee the details of a product liability case that involved my company. I think by way of example, I can illustrate why present law is so unfair to wholesaler-distributors and why passage of a uniform federal law is so necessary. Fortunately, this has been the only major product liability case involving a piece of Voss equipment thus far. However, given the lottery-like nature of the present system, it may well happen again . . . and I will have absolutely no control over its occurrence.

In this case, my company leased a used gas-operated fork lift truck to a steel company. The truck had been used by other companies prior to this on a leased basis. However, we carefully service it—as we do all such vehicles—before delivery. No modifications of any kind were made to the truck.

In this particular company, the truck was being used to transport heavy steel door frames from one part of the facility to another. As it happened, a man who had been with the company for several years was just transferred to this assignment to avoid layoff as a result of company cutbacks.

He received no formal training in the operation of the equipment and later admitted he had not been instructed on proper loading and unloading procedures. A co-worker who had been assigned to work with him for a short time told him the truck functioned much like an automobile and would take some getting used to.

After this admittedly insufficient learning period, the employee was left to his own devices to begin his new loading and unloading job. On the morning of his first day of independently operating the truck, not more than one after he set to work, the accident occurred. He had improperly stacked a load of heavy steel door frames in the upright position on the truck. When the operator went to remove one door, the other twelve on the truck tipped over and fell on him. He sustained relatively serious injuries as a result.

Voss Equipment was not even informed of the accident until the following summer, some six months later, when we received notice that a product liability action had been filed. The employee was suing my company, as well as the lift truck manufacturer, for damages of $775,000 for his injuries. Before I had become familiar with the details of the case, the manufacturer had already settled out of court.

Since I had product liability coverage, my insurance company handled the entire case for me. Upon reviewing the circumstances, they settled out of court for

$165,000. They knew the dangers of risking a jury trial given the trend in strict liability judgments against wholesaler-distributors.

My product liability premiums rose significantly as a result of the accident for which I had no fault. However, I don't hold the insurer to blame. Under that circumstance, I would have made the same decision to settle out of court.

I place the blame for my situation on the legal system. The development and evolution of strict liability imposes an impossible burden on non-manufacturing product sellers. It assumes that we can control the actions of product users to ensure safe and proper use of our products. This is not possible. We do not make the trucks we sell and lease; we cannot drive them for our customers; and we cannot keep a constant watch over their use. A fork lift truck is big, heavy and potentially dangerous if it is used improperly. There is no way this equipment can be made otherwise and still perform the tasks industry demands of it.

This type of case sums up much of the wholesaler-distributor's product liability problem. He's paying for the negligent actions of others, whether it be the occasional defective product passing through his warehouse in its original packaging, or the negligent use or misuse of one of his products in the home or in the workplace. Either way, he is being assessed under strict liability for events over which he has no control. When I explain this to others not in this business, they are dumbfounded. How can you be held liable for developments you cannot control? It defies logic and basic fairness. Furthermore, while ultimately being relieved from product litigation in most cases, wholesaler-distributors, nonetheless, incur substantial legal and insurance costs. These needless transaction costs are generally passed along to product users and benefit no one—except the lawyers.

It was clear to us that employer/employee negligence caused this needless and unfortunate accident. The injured employee scarcely received any training on the use and operation of the lift truck. It was obvious from the accident and later observations that the employer had condoned or encouraged an unsafe loading and transporting procedure which involved stacking the doors in an upright position on the truck and securing them to the truck's mast with rope. This is an unsafe method of stacking; the doors should have been laid across the fork lift flat, one on top of the other. This system was probably developed as a step saver to accommodate their shipping or storage operations.

Furthermore, in a deposition, the co-worker that had provided scant instruction on operating the lift truck to the injured employee said that he had repeatedly informed his supervisors that this particular truck had developed a problem; the forks tended to settle and sink under a heavy load. It was only several days after the injury had occurred that Voss Equipment was called in to examine the truck. Bear in mind, we had not been told about the accident. In testing the truck to see if fork settling was a problem, my serviceman found that this was not the case. He did, however, note on his service report that the truck showed signs of being overloaded.

The injured worker admitted under oath that he had never been told anything about the load capacity of the truck. The co-worker also admitted that his division never held any safety meetings until after the injury had occurred.

Yet, these facts made little difference in my case. Under strict liability, I was liable regardless of fault simply because I had leased the piece of equipment. The legal odds were weighted so heavily against me that a trial was not worth the risk, even though I was completely innocent of the harms caused.

It seems to me, as well as to thousands of other wholesaler-distributors, that this doctrine is grossly inequitable. In my case and in countless others like it, employers and employees should have borne the costs of their own negligent actions. Under the present scheme of strict liability, however, the responsibility for negligent injury-causing actions is shifted away from those who can best control product use to those who can least control it, wholesaler-distributors.

Fourteen states have now recognized the inequity of strict liability for non-manufacturing sellers and the logic of limiting the seller's liability to negligent conduct, demonstrating the need for a federal solution to the problem. This concept is fortunately included in Staff Draft 1 and 2. If the seller's negligent handling of a product causes an injury, then he is liable. This is undoubtedly the most critical product liability issue for wholesaler-distributors and other non-manufacturing product sellers.

Let me conclude my testimony by saying that if my negligent handling of a product causes an injury, I am prepared to assume responsibility for those actions. That is why I have product liability insurance. But to hold me strictly liable for the negligent injury-causing actions of others is simply not fair. I cannot afford that, and my insurer cannot adequately insure that kind of liability.

I am not a deep pocket, nor are other wholesaler-distributors. We are small businessmen and women. My company operates on a very limited profit margin of one to two percent of sales.

A uniform federal law for product liability is desperately needed to restore common sense and equity to the tort litigation system and to resolve the uncertainties in interstate commerce that have developed. Products that I have distributed are by now almost certainly in a number of states. Companies are relocating or selling off equipment all the time. Where will my next product liability case occur? Will I be willing to gamble on principle and take it into the courts, or will my insurance system again be called upon to pay for the costs of someone else's negligence?

I believe the product liability system in this country is unworkable. If steps are not taken to straighten it out, companies like mine that provide important services and jobs could be destroyed by one major case.

Mr. Chairman, I commend you for holding these critical hearings and urge you to move ahead with all due speed in the consideration and enactment of a uniform federal product liability law.

Thank you.

Senator KASTEN. Thank you very much for your testimony. And once more, these are the kinds of examples that we very much need before the legislative body as we consider solutions to this important problem. So thank you, Mr. Voss, very, very much.

The next witness is Mr. Herbert Goetz of the National Product Liability Council. Mr. Goetz.

Mr. GOETZ. Thank you, Mr. Chairman.

I am here as manager of product safety for Cincinnati Inc. I am also here today as a member of the Steering Committee of the National Product Liability Council. On my right I have Mr. Wendell Lund, counsel here in Washington, D.C., for the National Product Liability Council.

The members of the NPLC wish to thank you and the subcommittee and its staff for the immense amount of time and effort that you have put into this creation of staff drafts 1 and 2. I personally want to thank you for the opportunity of coming from Cincinnati and to share with you the experience of my company, Cincinnati Inc.

For the past 11 years, as the manager of product safety for Cincinnati I have been responsible for coordinating our corporate product safety program. Also, I am responsible for the investigation, trial preparation and trial or defense of product liability suits.

Cincinnati Inc. is a moderately small, privately held company. We were founded in 1898. We presently employ less than 700 persons. We manufacture metal processing machines. They are in essence power elements. One type of our product is a shear that is used for cutting metal, anywhere from very thin material up to 1½-inch steel. The steel may be anywhere from 4 feet left or right up to 28 feet.

We manufacture metal-bending equipment up to 2,000 tons. We have over 40,000 machines in the field in approximately 15,000 locations.

The most severe problem that my company is facing today is the product liability problem. As a moderately small company, we are faced with a problem that continues to grow not only in severity but complexity. The product liability costs our products must absorb have become exorbitant. Let me share with you some figures that we are experiencing in the way of costs on our products.

Our products sell from approximately $35,000 to $950,000. In 1970 our total product liability insurance cost was $200 per machine. In 1982 this is projected to be $11,000 per machine. In 1981, our product liability insurance cost was 3.3 percent of sales. In 1982 this is projected to be approximately 7.7 percent of sales.

Senator KASTEN. That was 1981 to 1982, 1 year?

Mr. GOETZ. That is correct, sir.

Senator KASTEN. From 3.3 percent to what?

Mr. GOETZ. 7.7 percent.

Senator KASTEN. That is just simply your insurance cost?

Mr. GOETZ. That is correct, sir. Cincinnati's product liability insurance costs have increased over 4,000 percent since 1970, from $43,000 per year to $1,750,000 in 1981.

Senator KASTEN. Mr. Goetz, I hope you are going to follow with some horrible example of a settlement, because this just makes absolutely no sense.

Mr. GOETZ. There is an explanation on that, sir, from several different directions. If you will like I would go into that right now.

We have been insured over the years on a retrospective rating program, which for all practical purposes we are self-insured. In addition to that, in 1978 we went to a retention. We retained a certain portion of our risk. So in essence, with the long tail of the insurance program, we are now being caught up in payment for some of the past experiences that we have had for prior years, both on a retrospective rating basis and also on the basis of the retention we have elected to take starting in 1978.

In addition to that, what affects the figure in 1982 is the reduction in the economy and anticipated reduction in the sales. So there are a combination of factors that have caused us to go into that 7.7 percent.

These insurance cost increases are clearly due to a combination of larger damages, coupled with an increase in the number of product liability suits and the great lack of predictability. Up through 1971 we received approximately two suits or less per year. In 1981 we received 19 suits. Currently we have 60 product liability suits pending against the company.

Senator KASTEN. 6–0, 60?

Mr. GOETZ. 6–0, yes, sir.

These costs brought about by the product liability problem must be passed on ultimately to the consumer. These costs are not related to productivity. They do not improve the performance of our product. They do not even contribute to the safety of our product.

These product liability costs contribute, however, to the inflationary spiral. They also affect our ability to compete. The problem as it has evolved has created a climate that is totally unpredictable. This in itself has contributed to our increasing product liability costs.

The life of our product becomes a unique factor. In essence, the life of our product, you might say, literally defies father time. Not only is our product beyond our control, but it is beyond our control for literally decades—20, 50 and more years.

It is not unusual for our product, after being in use for three or more decades, to be in the hands of a third or fourth owner, subject to misuse, alterations and poor or minimal maintenance. We may not even know where the product is. Generally we have no knowledge as to the use or application. The oldest machine we had involved in a product liability suit was 49 years old at the time of the occurrence. It had been modified and it was evident it had received minimal or no maintenance in recent years.

The inability to either understand or predict our responsibility as a manufacturer contributes to the problem. Some of our products are multifunctional, multipurpose types of machines. They cannot be fully safeguarded by the manufacturer. The use to which they are put is determined by the employer, and that very use may change from day to day and hour to hour.

How they are used must determine how they are going to be safeguarded. If no safeguarding is installed by the user, we are exposed to the allegation of failing to safeguard. If there is safeguarding on the machine, we are exposed to the allegation of failing to warn against an obvious and open hazard.

If there is a warning sign on the machine, it is alleged that our warning sign is defective, either for reason of location or language. Our engineers at that point in time ask us, how should we design the product, and we do not have an answer for them.

Let me say this. On behalf of my company and on behalf of the National Product Liability Council, we would implore you to expeditiously handle the staff draft that you have been developing. This type of uniformity and this type of element that will create an element of predictability within the industry is direly needed.

Thank you very much for the opportunity to be here.

[The statement follows:]

STATEMENT OF HERBERT W. GOETZ ON BEHALF OF THE NATIONAL PRODUCT LIABILITY COUNCIL

My name is Herbert W. Goetz, and I am Manager of Product Safety for Cincinnati Incorporated. I am here today as a member of the Steering Committee of the National Product Liability Council (NPLC) which is an organization of small to large manufacturing companies interested in a product liability system which would be more meaningful and balanced than the one we have today. I have also had experience testifying on behalf of my company in various courtrooms around the country in product liability cases, and in 1977 I testified before the House Small Business Committee on the very subject we are addressing today.

The members of NPLC would like to thank the Subcommittee for affording us the opportunity to present our views on such a vital subject. We also salute the Staff for the immense amount of time, thought, and effort which it has put into the creation of Staff Drafts 1 and 2. These drafts have served to coalesce the thinking of many segments of the business community and are providing the necessary impetus for legislation which has been needed in this area for so long a time.

The aproach I will take today will be from the point of view of a moderately small business which has been so affected by the currently disjointed evolution of product liability law that we are compelled to press for Federal legislation now.

This was the primary reason why my company, Cincinnati Incorporated, joined NPLC. The Council was formed in 1976 by a group of manufacturers such as ourselves for the purpose of trying to bring some order to an already chaotic situation. It is one of the few associations of this type which was organized for the exclusive purpose of addressing the resolution of the national product liability problem. Since that time, NPLC has been an active participant in the development of legislation considered in the House by the last Congress, and is pleased to continue in this capacity here today.

Cincinnati Incorporated is a small, privately owned company which specializes in the manufacture of metal fabricating machinery used for cutting and bending metal. This includes press brakes, shears, powered metal presses, and hydraulic presses. These products are used in the manufacture of agricultural equipment, transportation equipment, aircraft, ships, metal office furniture, appliances, metal buildings and many other metal-fabricated products. The prices for our products range from $35,000 to $950,000 depending on the size and complexity of the machine ordered. Founded in 1898, the company employs less than 700 persons and had sales of approximately $60 million in 1981. We estimate that about 40,000 of our machines are in use around the country in roughly 15,000 locations in almost every state.

In view of the nature of our product line and the comparatively small size of our company, the existing structure of product liability law from state to state has had a dramatic effect on our business as well as the business of the other members of NPLC. Specifically, because the laws in each state are different, a manufacturer in interstate commerce cannot operate on a predictable basis in knowing his obligations and responsibilities in each jurisdiction. The appendix which we are supplying briefly illustrates the difficulty of responding to various statutory and judicial requirements in several states.

The inevitable result—for my company as well as for claimants—is unprecedented legal and other expenses associated with product liability claims. Such costs are not related to productivity in any way. This "cost-push" simply adds to inflationary product prices, without improving the efficiency or safety of the product.

At Cincinnati Incorporated, we have estimated that, in 1970, our total product liability insurance cost per unit was $200. For 1982, we have projected this same cost to be $11,000 per machine. Our product liability insurance cost was 3.3 percent of total sales in 1981 and will be approximately 7.7 percent of total sales for 1982.

As another example of spiraling costs, another NPLC member reports that, in 1980, it had 49 product liability lawsuits brought against it for total claims of $20 million. In 1981, this same company was named a defendant in 61 product liability lawsuits for total claims of $83 million. So in one year, the number of cases increased by 24 percent, while the company's exposure rose by over 300 percent.

Cincinnati's product liability insurance costs have increased by over 4,000 percent since 1970, going from a low of $43,000 to $1,750,000 in 1981. These cost increases are clearly due to the vastly larger damages being awarded today, coupled with the greater number of claims being brought against our company and industry as a whole.

There are other factors contributing to the dramatic rise in total product liability costs. In many cases, the cost involved in man hours responding to the discovery demands of plaintiffs, defense discovery, and actual trial costs have distorted the normal manufacturing costs. For example, in one case we were ordered by a judge to produce the engineering files on approximately 700 machines.

We have found that as product liability costs have added to the inflationary spiral, a "ripple effect" has also been created which feeds on itself as these additional factors come into play. The ultimate irony is that whatever product liability costs are incurred as an addition to our product price, they must be passed on. As I stated before, however, these additional costs are not related to producitivity, and no additional benefits in product performance are apparent at the higher price.

The "ripple effect" I mentioned has another impact on our ability to compete. Our industry is vital to the entire U.S. defense industrial base. As our productivity and cost effectiveness is further reduced by increased overhead costs, our ability to supply industrial equipment may be deteriorating. We obviously are not attributing this effect entirely to product liability costs, nor are we saying that we are unwilling to assume costs for product safety and improvement. However, it is an illustration of how the fine line of being competitive or non-competitive can be eroded by non-productivity related factors.

Another "ripple" is the impact on product development and innovation. We believe the total unpredictability in product liability law has hampered improvement in product design. Our company cannot say with certainty that design changes meant to improve a machine's efficiency, output or even its safety would not be held by some courts as evidence that the product was previously designed improperly. As a result, new product designs may be held off the market. It is apparent that uncertain legal conditions are influencing marketing and design decisions, and adversely affecting design improvement and product availability—to the detriment of both the producer and the consumer.

The second major factor inherent in Cincinnati's product liability dilemma is the long-life exposure of our products. When I testified before the House Small Business Committee a few years ago on the subject of general product liability problems, I stated that our products seemingly defy "Father Time." While I am extremely proud of the quality of my company's products, because I believe that quality is the key factor in competition, this marvelous fact does not seem as fortunate in view of the way product liability law has evolved in the courts.

Our tort system was founded on the basis of fault. However, too many cases today are tried on the basis of providing compensation without regard to fault. Thus the concept of "strict liability" is truly becoming one of "absolute liability."

This system has the most dramatic impact on products such as ours which have such a long life span and utility. Cincinnati machines which have been in service for decades may now be in the third or fourth generation of ownership. Invariably subsequent owners modify machines, misuse them, and maintain them poorly. Yet Cincinnati has no control and frequently no knowledge of the user and the application and condition of the product.

In spite of this, the doctrine of "absolute liability" continues to grow, and Cincinnati is being held responsible for machines that left our control 20, 30 or 40 years ago or more!

We are not here to ask that consumers be denied the right to make claims against faulty products. In fact, our view is just the opposite. We believe that a manufacturer who designs, manufactures and sells a faulty product should assume his share of the responsibility for harm caused by that product.

On the other hand, we do not believe the system that has evolved should be allowed to continue. We are asking for a restoration of balance in the system by returning to a system of fault. Our tort system should be a "trier of facts" for the purpose of apportioning the blame, and should not place the blame on the manufacturer—regardless of fault—simply because it is believed that he has the ability to pay.

The operation of state worker's compensation laws frequently serves to insulate the responsible party—often the employer—from further legal liability to an injured employee with the result that the injured person's attorney looks to the product manufacturer for relief.

The NPLC is asking for fairness and certainty in the application of product liability tort law. In order to accomplish this, appropriate Federal legislation should include at least four major components which would form the basis for an equitable and balanced system. Each of the areas discussed below will help to accomplish the goals of restoring the fault system and reducing transaction costs to the benefit of all parties involved.

1. *Statute of Repose*—Because of the longevity of products such as those made by Cincinnati, NPLC favors a statute of repose in accordance with its comments on Staff Draft 1. Staff Draft 2 provides for a lawsuit to be brought for reasons of unsafe design or failure to warn about a danger connected with the product during a specified period of repose. We believe that a repose statute of, for example, 10 years would provide sufficient time to discover these faults.
2. *Misuse and Alteration*—A reasonable product liability law will affix fault for harm on the party creating the condition which caused the harm. NPLC does not believe that a manufacturer should be liable for the actions of others who have misused or altered a product. This concept is included in Section 8 of Staff Draft 2, as well as in Sections 7 and 9 which deal with liability of the employer.
3. *Responsibility of Manufacturers*—In order to provide a uniform and consistent set of obligations to guide manufacturers and to establish grounds for legitimate claims by injured parties, NPLC favors the delineation of certain "ground rules" under which claims may be brought and which relate directly to manufacturer's responsibility. This would provide for uniform state-by-state application of product liability law through which a manufacturer in interestate commerce will be cognizant of the exact conditions under which he is liable. Section 4 of Staff Draft 2 has addressed this component in a highly commendable manner.
4. *Subsequent Changes*—Product innovation and redesign—which are so necessary in relation to productivity and competition—must not be taken as evidence that previously manufactured products were either unsafe or of inferior design. Section 12 of Staff Draft 2 deals with this problem. However, NPLC recommends additional review of this section to determine more fully its ramifications.

In conclusion, I would like to return to the two major premises of my testimony. First, product liability costs are affecting the ability of U.S. companies to compete. This has vast implications for industry as a whole and for individual product lines, with no visible benefits to users and ultimately the consuming public.

Second, the longevity of products due to quality engineering and design has inadvertently exposed my company and other companies to uncontrollable product alterations and abuses for which we are held responsible, and has made manufacturers insurers of their products in perpetuity.

The NPIC urges this Subcommittee to act in a expeditious manner to treat these problems and to restore balance to our product liability tort system.

Thank you.

[The following information was subsequently received for the record:]

National Product Liability Council,
Washington, D.C., April 22, 1982.

Hon. Robert W. Kasten, Jr.,
Chairman, Consumer Subcommittee, U.S. Senate Committee on Commerce, Science, and Transportation, Russell Senate Office Building, Washington, D.C.

Dear Senator Kasten: In the testimony of Herbert W. Goetz before the Consumer Subcommittee on March 12, 1982, on behalf of the National Product Liability Council, concerning Staff Working Draft No. 2 of the Product Liability Act, he indicated that he would supplement his remarks with evidence of the difficulties confronting manufacturers in dealing with the "crazy quilt" of state laws governing product liability. The attached memorandum recounts experiences in product liability claims which Mr. Goetz's company, Cincinnati, Inc., of Cincinnati, Ohio, has had recently in three different jurisdictions.

To show the confusion and uncertainty, it may be useful to examine briefly a product liability case in each of the three states mentioned in the Goetz memorandum. These three cases provide four different legal standards for judging the adequacy of product design in product liability cases. A case cited in a fourth state provides still another legal standard.

In *Cepeda* v. *Cumberland Engineering Co., Inc.*, 76 N.J. 152 386 A.2d 816 (1978) the New Jersey high court approved the following standard for judging product designs: "A product is in a defective condition unreasonably dangerous if it is so likely to be harmful that a reasonably prudent manufacturer, who had actual knowledge of its harmful character, would not place it on the market. It is not necessary to find that the defendant had knowledge of the harmful character of the product in order to determine that it was in a defective condition unreasonably dangerous." Although this standard sounds at first blush like the negligence standard of "reasonable care," it will be observed that knowledge of the risks associated with a product is presumed—even if no one in the world could have known of the risks prior to the plaintiff's injury. Thus, manufacturers are held liable in New Jersey even for risks that are totally unforeseeable and against which no one can adequately insure.

Under the New Jersey approach, the question of "defective condition unreasonably dangerous" is to be given to the jury to decide in most instances. In Pennsylvania, on the other hand, the "unreasonably dangerous" issue is *never* to be given to the jury. In *Azzarello* v. *Black Brothers Company, Inc.*, 391 A.2d 1020 (Pa. 1978), the Supreme Court of Pennsylvania articulated a new and different test for design cases: questions such as "when does the utility of a product outweigh the unavoidable danger it may pose?," while relevant to the decision, are never to be given to the jury to decide, but are exclusively questions of law for the judge. The confusion generated by this assignment of functions has led one product liability commentator to conclude: "Obviously, the Supreme Court of Pennsylvania has misunderstood the analysis upon which it purports to rely." *Henderson, Renewed Judicial Controversy Over Defective Product Design*, 63 Minn. L. Rev. 773, 799 (1979).

If the significant differences in approach to the question of unreasonable product design between New Jersey and Pennsylvania were not enough to give corporate planners gray hairs, a federal district court in Wisconsin has recently interpreted that state's law to reach the startling conclusion that "there may be recovery for the negligent design of a product even though [the design] is not unreasonably dangerous." *Schuldies* v. *Service Machinery Co.*, 448 F. Supp. 1196 (E. D. Wis. 1978). At least New Jersey and Pennsylvania agree that "unreasonably dangerous" is a relevant concept in product design cases; but Wisconsin appears to abandon that idea altogether.

Product design standards established in California are even more confusing and "different". In *Barker* v. *Lull Engineering Co.*, 20 Cal. 3d 413, 573 P. 2d 443, 143 Cal. Rptr. 225 (1978), the California high court gives us not one, but *two* standards for judging defective designs: "[I]n design defect cases, a court may properly instruct a jury that a product is defective in design if (1) the plaintiff proves that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, *or* (2) the plaintiff proves that the product's design proximately caused injury and the defendant fails to prove, in light of the relevant factors, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design."

Thus, in four states, Cincinnati, Inc., is held to *five* different standards regarding the sufficiency of its product designs. What one state emphasizes as the crucial test for liability, the next state rejects as irrelevant. An issue for the jury in one state becomes an issue exclusively for the judge in the next. And an issue for the plaintiff to prove in one state becomes an issue for the defendant to *disprove* in the next.

These five differences in legal standards in four states typify the conflicts that now exist among the states in product liability law. There is no reason to anticipate a resolution of the confusion and uncertainty except through federal legislation.

Sincerely,

WENDELL LUND,
Legislative Counsel.

Enclosure.

ACTUAL EXPERIENCES OF CINCINNATI, INC. (CINCINNATI, OHIO) IN PRODUCT LIABILITY CASES IN THREE STATES WITH DIFFERING LEGAL STANDARDS FOR PRODUCT DESIGN

New Jersey

The product was a ¼′ to 12′ power operated metal cutting shear shipped by us in 1973. The shear has safeguarding in front of the knives. A warning sign was affixed near the right end, adjacent to the set-up controls where the employer would go to start the shear and select the controls. The front of the shear was approximately 12′ left to right. The operator was near the right end and the helper near the left end. The shear had one electric footswitch used by the operator.

The operator and helper were aware of the potential hazard of the area between the knives, which was open and obvious. The helper forced his hands into the knife area as he removed a scrap piece. At that time the operator cycled the shear. The helper had parts of three fingers amputated. Our company was sued. The case was tried and we were held liable. Although the warning sign was obvious and clearly visible, it was held to be inadequate because if its location.

California

The product was a general purpose press brake—90 ton capacity—shipped by my company in 1962. It has one operator control, a foot pedal for manual activation of the brake and clutch mechanism. Fourteen years after shipment, in 1976, an operator and helper were working on the press brake bending large sheets of steel. A work table, with wheels, was used to store the steel sheets before being bent. A pickup truck was stored overnight in the plant in front of the work table.

While the two employees were bending parts of the press brake, a third employee was instructed to back the truck out of the plant. The third employee put the truck into forward, instead of reverse, and rammed the worktable. The table rolled forward and struck the two employees pushing them into the press brake as the operator was bringing the ram down on a piece of steel.

The operator injured three fingers and sued the manufacturer. We settled out of court to minimize defense costs.

Pennsylvania

The product was a 300 ton press brake shipped in 1949 and equipped with one operator control—a foot pedal for manual activation of the brake and clutch mechanism.

Twenty-nine years after shipment, in 1978, an operator smashed the tips of three fingers when he cycled the ram while talking to a fellow worker. At the time of the occurrence the press brake had an electric footswitch for an operator control. The employer had modified the controls on the press brake before the occurrence. He removed the manual controls and installed air valves, air cylinders and an electric footswitch. The method of operating the brake and clutch mechanism was significantly modified. It was alleged the employees inadvertently operated the press brake. This would not have occurred but for the employer modification. The injured employee brought suit against us. Fortunately, we won at trial. But the fact that the vagueness and uncertainty of the law encouraged the plaintiff to sue in the first place caused us to incur thousands of dollars for expenses in defending a worthless claim.

I believe that the foregoing descriptions of the experiences of Cincinnati, Inc., in trying to cope with the differing legal standards in three states support the conclusion that uniform federal standards are needed.

HERBERT W. GOETZ,
Manager, Product Safety.

Senator KASTEN. Mr. Goetz, thank you very much. The next witness on this panel is David Greenberg, who is the legislative director of the Consumer Federation of America. David, we look forward to your testimony.

Mr. **GREENBERG**. Thank you, Senator Kasten.

As you said, I am David Greenberg, legislative director of the Consumer Federation of America, a nationwide coalition of consumers and workers. Our 200 affiliates represent over 30 million people.

CFA maintains a strong and abiding interest in the debate concerning the proper standards of liability governing product-related injuries to consumers and workers. In an attempt to sort out the conflicting claims in the midseventies we published "The Product Liability Controversy: A Handbook for Consumers."

We believe now, as we did then, that there is no fundamental crisis in the product liability field which requires Federal intervention in a traditional State concern. Indeed, we are persuaded that this attempt to overturn approximately 150 years of State law will precipitate a crisis far greater than the one it seeks to remedy.

By no means is this legislation before us today a limited Federal approach. Instead, the proposed act wipes out decades of State law, law which has proved itself capable of adapting to changing economic conditions and social expectations. The common law process has moved step by step, sometimes haltingly, to balance the competing interests of consumers and workers in product and workplace safety against those of manufacturers, distributors, and sellers in production and product innovation.

Over time, the increasing complexity of products has forced State courts to tackle a series of very intricate problems, for example, how to assign responsibility for damage caused by products so identical that individual products cannot be attributed to their specific manufacturers.

Because these questions are difficult, the chances for mistakes are large. Thus it is fortunate that each State has been able to examine the doctrinal developments in all other States as a laboratory for it own new principles. In this sense, the process is self-correcting, for errors in one State need not ripple across the country, as would flawed national standards.

By substituting Federal standards, the Product Liability Act greatly expands Federal power without significantly simplifying the development of legal doctrine. A whole new legal vocabulary in the bill will inevitably require specific definition by the courts. To the extent different courts employ varying definitions and applications of these terms, national uniformity will be largely an illusion. Certainly will also be an illusion. Courts will continue to seek ways to compensate innocent victims.

This legislation may also enlarge the power of Federal agencies. Section 6 creates a presumption against liability for manufacturers who comply with Federal agency regulations concerning their products. Note that only those products with applicable Federal standards qualify for this presumption of nonliability. Accordingly, the legislation creates a clear incentive for industries to encourage the development of Federal standards as a partial but powerful shield against product liability suits.

While as a general proposition we disagree with the idea of Federal preemption in the product liability context, the specific preemption envisioned in the Product Liability Act makes us even more uneasy. The legislation deals with an extremely complex and intricate area of the law that is not susceptible to facile analysis. Nevertheless, it is useful to look at a product liability claim as a series of hoops through which injured plaintiffs and defending manufacturers must jump.

Unfortunately, our analysis of the Product Liability Act suggests that nearly every single provision either narrows the hoops for plaintiffs or enlarges them for defendants. We fear that this legislation, if enacted, will force too many innocent victims to thread a legal needle, while providing too many defendants with a legal hole large enough to drive a truck through.

In broad brush, the act changes current law in five major ways:

First, the legislation erects several absolute bars to litigation. Despite their injuries, certain plaintiffs would be unable to prosecute liability claims under the act.

Second, the legislation weakens the legal standard applicable in many States to the conduct of manufacturers.

Third, the legislation raises the amount of proof plaintiffs must offer in certain circumstances and limits the utility of certain evidence in others.

Fourth, the legislation expands the way in which manufacturers can avoid liability even if plaintiffs prove that a dangerous product made by the defendant caused their injury.

And, fifth, the legislation restricts the amount of punitive damages that may be recovered by limiting their applicability and by erecting a very stringent legal standard affecting cases where punitive damages may apply.

I would like to give one example. It has been said here that the legislation is primarily designed for small businesses. Certain features of the act directly contradict this. Section 4(a)(1)(B) is a prime example. That section requires plaintiffs to prove that the specific product unit causing injury was manufactured by the defendant. The purpose of this provision is absolutely clear. It seeks to overturn legislatively the rule of law under which drug manufacturers can and will be held liable for the defective drug DES.

In the *Sindell* v. *Abbott Laboratories* case, the California Supreme Court recognized that it was impossible for the daughter of a woman given DES to identify the particular manufacturer responsible. All manufacturers produced the drug identically and users never know which manufacturer produced the drug they receive from a pharmacy.

Accordingly, the *Sindell* precedent will allow a plaintiff to proceed if she is suing manufacturers who controlled a substantial share of the market at the time her mother took the drug. If the plaintiff prevails, the court will then apportion liability according to the market share controlled by each individual manufacturer.

Under the legislation we are considering, however, an entire industry could escape liability for thousands of injuries caused by identical products which are admittedly unreasonably dangerous, if the plaintiffs cannot demonstrate which specific product was manufactured by which company. This standard is reminiscent of the classic trap laid by first year torts teachers in law school: If a person walking through the woods is fired upon by two hunters with identical guns and identical ammunition, but struck by only one bullet, can the hunters escape liability simply because the victim cannot prove whose bullet caused the injury? The traditional answer has been an obvious and resounding "No".

Transposed to the product liability context, however, this legislation now says manufacturers may avoid liability for a similarly obvious and dangerous wrong.

In conclusion, Mr. Chairman, this is perhaps the most inappropriate time to restrict the rights of injured consumers and workers. The recent attack on the Federal regulation of product safety and the resulting cuts in the Consumer Product Safety Commission budget mean inevitably that victims of dangerous products will be forced to turn to the courts more than in the past. Accordingly, we believe that the proposed Product Liability Act is a move in the wrong direction.

Having said that, let me express our concern for the legitimate problems of small manufacturers with liability premiums and large damage judgments. We believe many of these problems are real and cry out for a solution. We pledge our willingness to work with you and the committee staff to develop solutions in the areas of tax and financial incentives for safety, implementation of risk retention plans and high risk pools, and alternative compensation systems outside the courts.

Mr. Chairman, we know you have been a leader in this field and we salute your effort on the Risk Retention Act and hope to work with you on other positive initiatives. Ultimately, however, we do not believe that changing liability rules is the answer, not for manufacturers and certainly not for the consumers and workers who are harmed by dangerous products.

For the latter, our most fundamental notions of justice demand liability standards which elevate safety to its highest feasible level, and when that is insufficient to prevent harm, compensation for all injuries, present and future.

We thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF DAVID I. GREENBERG, LEGISLATIVE DIRECTOR, CONSUMER FEDERATION OF AMERICA

Senator Kasten and members of the Subcommittee, Consumer Federation of America (CFA) welcomes the opportunity to testify on the proposed Product Liability Act.

CFA maintains a strong and abiding interest in the debate concerning the proper standards of liability governing product/related injuries to consumers and workers. We commented on the Uniform State Product Liability Law drafted by the Commerce Department in 1979 and, in an attempt to sort out the conflicting claims of the mid-1970's, we published The Product Liability Controversy: A Handbook for Consumers. We believe now, as we did then, that there is no fundamental crisis in the product liability field which requires federal intervention in a traditional state concern. Indeed, we are persuaded that this attempt to overturn 150 years of state law will precipitate a crisis far greater than the one it seeks to remedy.

THE PRODUCT LIABILITY CRISIS REVISITED

The agitation of the mid 1970's concerning product liability law centered on the steep increases in certain manufacturers' insurance premiums. Insurance carriers attributed those increases—reported in some cases to be 200-400%—to the mushrooming of product liability lawsuits. The industry advertised nationwide that such claims numbered one million annually.

The industry public relations campaign further justified rate increases by pointing to court decisions holding manufacturers liable for product-related injuries notwithstanding the evidence of clear negligence by plaintiffs. We all remember the most famous plaintiff, the man who recovered for injuries suffered when he attempted to trim his tall hedges by hoisting a rotary lawn mower into the air. As you might recall, both the one million figure and the lawn mower victim proved to be apocryphal; the former was reduced by best estimates to no more than 140,000, while the latter has never been documented.

The 1975 Interagency Task Force on Product Liability, organized at White House request, did document substantial insurance premium increases, particularly in high-risk product industries such as pharmaceuticals, automotive parts and medical devices. Even in these high risk industries, however, the Task Force reported that the average cost of product liability premiums barely exceeded 1% of total sales.

The Final Report of the Task Force, issued in November 1977, cited several factors as sources of rising insurance premiums: subjective and irrational insurance ratemaking practices, past misjudgements regarding appropriate product liability premium levels, unsafe manufacturing practices, increases in the number and complexity of products, heightened consumer awareness and willingness to seek legal redress, expansion by courts of the rights of injured plaintiffs, and inflation. Because of the multiplicity and complexity of these causes, it is not surprising that the Task Force's Legal Study cast severe doubt on product liability law preemption as a potential solution. According to the Legal Study, such proposed remedies ". . . even if considered equitable to the plaintiff, [they] could have only a marginal impact on diffusing the claimed insurance problem." "In other words," the study concluded, "no inequitable doctrine or group of doctrines, even changed immediately, could produce a greater availability of or a lower cost for insurance."

Since the time of the Task Force, the federal government has taken two significant steps to ease the cost of liability insurance to manufacturers: first, the Revenue Act of 1978 greatly expanded the tax deductibility of product liability judgements and settlement costs; second, the Risk Retention Act of 1981 has given small manufacturers an alternative to traditional insurance carriers by allowing them to create their own self-insurance pools. CFA believes that this last measure has far greater potential for protecting industry against liability premium increases than does the preemption of state law. We urge the Subcommittee to hold hearings to monitor the impact of Risk Retention Plans on both manufacturers' costs and insurance carriers' ratemaking practices.

THE FORGOTTEN CRISIS: UNSAFE PRODUCTS

Despite the handwringing of the 1970's, the number of product liability lawsuits is actually quite small compared to the number of injuries caused by defective products. While the number of claims cannot be pinpointed, estimates range from 60,000 to 140,000 annually. The number of people injured in household accidents alone—the bulk of which are product related—simply dwarfs that figure: According to the National Safety Council's recent data 23,000 deaths, 3 million disabling injuries and 19.8 million other injuries occur annually. As a result of its impact on the current rights of plaintiffs and defendants, the Product Liability Act will increase the gap between injuries and lawsuits, diluting the deterrent value of any given claim and thus weakening manufacturers' incentive to design for safety.

THE IMPACT OF PREEMPTION ON FEDERAL POWER

The proposed Product Liability Act wipes out decades of state law, law which has proved itself capable of adapting to changing economic conditions and social expectations. The common law process has moved step by step—often haltingly—to balance the competing interests of consumers and workers in product and workplace safety against those of manufacturers, distributors and sellers in production and product innovation. Over time, the increasing complexity of products has forced state courts to tackle a series of very intricate problems—for example, how to allocate liability for injuries arising from foreseeable misuses of products and how to assign responsibility for damage caused by products so identical that individual products cannot be attributed to their specific manufacturers.

Because these questions are difficult, the chances for mistakes are large. Thus it is fortunate that each state has been able to examine the doctrinal developments in all other states as a laboratory for its own new principles. In this sense, the process is self-correcting, for errors in one state need not ripple across the country as would flawed national standards.

By substituting federal standards, the Product Liability Act greatly expands federal power without significantly simplifying the development of legal doctrine. A whole new legal vocabulary in the bill will inevitably require specific definition by the courts. To the extent different courts employ varying definitions and applications of these terms, national uniformity will be largely an illusion.

This legislation also may enlarge the power of federal agencies. Section 6 creates a presumption against liability for manufacturers who comply with federal agency regulations concerning their products. Note that only those products with applicable federal government standards qualify for this presumption of non-liability. Accordingly, the legislation creates a clear incentive for industries to encourage the development of federal standards as a partial but powerful shield against product liability suits.

THE PROVISIONS OF THE PRODUCT LIABILITY ACT

While as a general proposition we disagree with the idea of federal preemption in the product liability context, the specific preemption envisioned in the Product Liability Act makes us even *more* uneasy. The legislation deals with an extremely complex and intricate area of the law that is not susceptible to facile analysis. Nevertheless, it is useful to look at a product liability claim as a series of hoops through which injured plaintiffs and defending manufacturers must jump. Unfortunately, our analysis of the Product Liability Act suggests that nearly every single provision either narrows the hoops for plaintiffs or enlarges them for defendants; we fear that this legislation, if enacted, will force too many innocent victims to thread a legal needle while providing too many defendants with a legal hole large enough to drive a truck through.

In broad brush the Act changes current law in five major ways:

1. *Thresholds.* The legislation erects several absolute bars to litigation. Despite their injury, certain plaintiffs would be unable to prosecute liability claims under the Act.
2. *Standards of Liability.* The legislation weakens the legal standard applicable in many states to the conduct of manufacturers.
3. *Standards of Proof.* The legislation raises the amount of proof plaintiffs must offer in certain circumstances and limits the utility of certain evidence in others.
4. *Defenses.* The legislation expands the ways in which manufacturers can avoid liability even if plaintiffs prove that a dangerous product made by the defendant caused the injury in question.
5. *Measure of Damages.* The legislation restricts the amount of punitive damages that may be recovered by limiting their applicability and by erecting a very stringent legal standard affecting cases where punitive damages may apply.

THRESHOLD BARS

Certain features of the Act make it futile for injured plaintiffs to bring lawsuits. Section 4(a)(1)(B) is the prime example. That section requires plaintiffs to prove that the specific product unit causing injury was manufactured by the defendant. The purpose of this provision is absolutely clear: it seeks to overturn legislatively the rule of law under which drug manufacturers were held liable for the defective drug DES. In the *Sindell* v. *Abbott Laboratories* case, the California Supreme Court recognized that it was impossible for the daughter of a woman given DES to identify the particular manufacturer responsible: all manufacturers produce the drug identically and users never know which manufacturer produces the drug they receive from a pharmacy. Accordingly, the *Sindell* precedent will allow a plaintiff to proceed if she is suing manufacturers which controlled a substantial share of the market at the time the plaintiff's mother took the drug. If the plaintiff prevails, the court will then apportion liability according to the market share controlled by each individual manufacturer.

Under the legislation you are presently considering, however, an entire industry could escape liability for thousands of injuries caused by identical products—admittedly unreasonably dangerous—if the plaintiffs cannot demonstrate which specific product was manufactured by which company. This standard is reminiscent of a classic trap laid by first year torts teachers: if a person walking through the woods is fired upon by two hunters with identical guns and ammunition, but struck by only one bullet, can the hunters escape liability simply because the victim cannot prove whose bullet caused the injury? The traditional answer has been an obvious and resounding "NO". Transposed to the product liability context, however, this legislation now says manufacturers may avoid liability for a similarily obvious and dangerous wrong.

STANDARDS OF LIABILITY

The Act eliminates the doctrine of strict liability for design defects, triggering a vast change in the case law of the states. As it stands today, the doctrine of strict liability allows an injured plaintiff to recover if he or she is injured by a product rendered unreasonably dangerous by a defect in its design. The law therefore concentrates on the dangerous condition of the product—not the conduct of the manufacturer—and concludes that an innocent purchaser injured by a dangerous product should not bear the loss. Instead, the case law holds that the manufacturer responsible for designing the defective product and injecting it into the stream of commerce is better able to bear the loss, and should bear that loss as a necessary incentive for safe product design.

The test proposed by the Product Liability Act is one of negligence: whether a reasonably prudent manufacurer would have used the design in question. The elements of the test are first, whether the manufacturer knew or should have known of the existence of the danger causing harm to the plaintiff; and second, whether a means to eliminate that danger was practically and technologically feasible. The legislation would therefore allow many manufacturers to trade off costs against injuries explicitly in their design decisions without incurring any liability. In innumerable circumstances, then, a purchaser who buys a product in good faith will go uncompensated for injuries that only the manufacturer could have prevented. This result has been rejected by many state courts in recent years and has no place in an economy in which products are increasingly complex and increasingly dangerous.

The legislation also weakens the legal standard governing a manufacturer's duty to warn consumers and workers of potential product dangers. The Act essentially requires warnings only where plaintiffs can prove that a warning would cause a reasonably prudent product user to decline to use the product or to use it in a manner which would avoid harm. The current law requires that plaintiffs prove only that they individually would have changed their behavoir, even if their attitude about safety differs from that of the mythical reasonably prudent product user.

Another troubling feature of the Act's duty to warn provisions is that manufacturers may avoid liability by warning an intermediate seller, employer or other person who could be expected to warn the worker or consumer. We are concerned that the legislation does not in all circumstances place a concomitant duty on these middly men to follow through with warnings. If it does not, then a worker or consumer injured as a result of a defective warning could find himself/herself in the position of having a valid claim but no actionable defendant. If this is not the intent of the drafters, then a clarification may be necessary.

Even if the Act does create a duty to warn for intermediate sellers and employers, their financial condition may as a practical matter make that duty irrelevant. These potential defendants are less likely than manufacturers to be able to satisfy major liability judgments. In cases where they cannot, we suggest that the Act revive the plaintiff's claim against the manufacturer. This provision could be drafted in much tha same manner as section 5(b)(2), which allows plaintiffs to sue sellers or distributors when manufacturers cannot satisfy a judgment against them.

STANDARDS OF PROOF

Sections 4(a)(3) and 5(a)(2)(B) effectively eliminate the doctrine of collateral estoppel, which today in many states removes from plaintiffs the need to prove crucial facts which have already been proven in prior litigation. Before collateral estoppel is applicable, however, a judge must determine that an issue of fact has been fully and fairly litigated so as to work no hardship against the defendant; the doctrine is used only when a defendant can be said to have had his day in court concerning an issue of fact. The virtual destruction of the doctrine by the Act will force plaintiffs to spend a great deal of time and money relitigating facts. Defendants, on the other hand, will be able to experiment with different approaches, evidence and tactics in each trial until they find a winning combination. We believe the current collateral estoppel standard—which commits the fairness of the doctrine in individual circumstances to the discretion of the court—is a better treatment of facts commom to several suits.

The legislation creates another issue of proof which threatens to work a disproportionate hardship on plaintiffs. Sections 4(a)(2) and 5(a)(2)(A) render expert opinion insufficient by itself to meet a plaintiff's "preponderance of the evidence" standard of proof. These provisions require plaintiffs to introduce substantial objective evidence to corroborate or support expert witnesses.

Because injured workers and consumers—unlike many defending manufacturers—often have little or no access to back-up design, engineering and technical data in complex cases, expert opinion is critical. It is our view that sufficient safeguards presently exist to ensure that plaintiffs' expert opinion is not over-valued by juries. After all, judges assess experts' qualifications prior to their testimony and instruct juries on the ultimate issues of liability and how they relate to proof offered at trial. In addition, defendants may always seek to overturn a verdict based on insufficient expert evidence through a motion for new trial or judgment N.O.V., of by taking an appeal. In addition, we question why the Act creates no corresponding limitation on defendants' use of expert witnesses on issues for which they bear the burden of proof.

DEFENSES

The Act proposes major changes in the legal impact of manufacturers' compliance with federal regulations that govern their products. Currently, state case law treats such compliance as evidence of due care but attaches no conclusive weight to it. This standard reflects—we believe appropriately—the fact that federal regulations often set only minimum levels of safety. It also reflects the reality that regulations can become outdated and lag behind common industry practice.

Notwithstanding these realities, the legislation creates a rebuttable presumption for compliance, which plaintiffs can overcome only by "clear and convincing evidence." We fear that juries will have difficulty evaluating evidence under two different standards in the same case ("preponderance" generally, "clear and convincing" regarding federal regulations) such that the rebuttable presumption will tend to become a conclusive one.

We also disagree with the way the Act disposes of a defendant's failure to meet federal product regulations. Currently, common law treats such failures as negligence per se. Because regulations are so often minimal in nature, this standard is more appropriate than the rebuttable presumption created by section 6(a)(1)(B).

The alteration/misuse defense in the Act also creates a potential problem. Section 4(d)(4)(B)(iii) relieves manufacturers from their duty to warn if the harm to the plaintiff results from alterations or modifications which do not constitute "reasonably anticipated conduct on the part of the product user." The current common law employs what appears to be a different test, inquiring whether misuse or alteration is "foreseeable." We believe foreseeability should be the touchstone of liability. If the drafters intended reasonably anticipated conduct to correspond to foreseeability, they should make it more explicit.

PUNITIVE DAMAGES

Our greatest concern about the Act's standards for awarding punitive damages is that such damages will as a practical matter no longer be applicable to corporations. Section 11(a)(2) explicitly exempts choices among alternative product designs made in the ordinary course of business from the triggering definition of "reckless disregard." Consequently, no matter how reckless such a decision may prove to be—and no matter how dangerous the product that emerges from that decision—the defendant will not face punitive damages.

In addition, Section 11 appears to exempt from punitive damages any instances of corporate recklessness on an industry-wide basis. This exemption is created by the language requiring punitive damages to be based only on an "extreme departure from accepted practice." We believe that these restrictions are not justified by past abuses of punitive damages and that the factors contained in Sections 11(b) and 11(c) provide sufficient safeguards against unreasonable awards.

CONCLUSION

Mr. Chairman, this is perhaps the most inappropriate time to restrict the rights of injured consumers and workers. The recent attack on the federal regulation of product safety and the resulting cuts in the Consumer Product Safety Commission budget mean inevitably that victims of dangerous products will be forced to turn to the courts more than in the past. Accordingly, we believe that the proposed product Liability Act—in its present form—is a move in the wrong direction.

Having said that, let me express our concern for the legitimate problems of small manufacturers with liability premiums and large damage judgments. We believe many of these problems are real and cry out for a solution. We pledge our willingness to work with you and the Committee staff to develop solutions in the areas of tax and financial incentives for safety, implementation of risk retention plans and high risk pools, and alternative compensation systems outside the courts.

Ultimately, however, we do not believe that changing liability rules is the answer—not for manufacturers and assuredly not for the consumers and workers who are harmed by dangerous products. For the latter, our most fundamental notions of justice demand liability standards which elevate safety to its highest feasible level and, when that is insufficient to prevent harm compensation for all injuries, present and future.

Consumer Federation of America thanks the Subcommittee for this opportunity to testify.

Senator KASTEN. Mr. Greenberg, I particularly would like to thank you. You are quite surrounded by manufacturers here this morning, but I have enjoyed working with you.

You made the point that the Federal standard-setting and preemptions in the second draft, has been narrowed significantly in part because of the work that we have done to date. And I understand you will not necessarily agree with the people on either side of you or with us, but I very much appreciate your willingness and the willingness of your organization to continue to provide important and well thought out input from the direction of the consumers and the people that you represent.

So on behalf of the committee I would just like to thank you for your testimony, understanding that we do not always agree. But I think this exchange is very, very productive.

Mr. Greenberg stated—I will just try to address this to everyone, I guess—that product liability reform could best be left to the States. Some of you addressed that question in your testimony. Mr. Mack, what do you think of the argument that the consumer—excuse me—that product liability can be left to the States?

Mr. MACK. Mr. Chairman, a number of years ago the CFA came before this committee and in testifying in favor of Federal no-fault legislation said that:

> Only at the Federal level can legislation effectively minimize the insurance difficulties of interstate travel and help eliminate much of the unnecessary administrative costs and confusion resulting from a wide disparity in State no-fault laws.

Now, I think if you deleted the words "no fault" and "interstate travel" out of that and substituted the words "product liability" that you would have made a very persuasive case for Federal preemption in this area. There is a difference, but I think the difference works in favor of those who would urge Federal product liability tort legislation upon you.

In the case of automobile insurance, as one of the other witnesses pointed out, automobile insurance rates are set on a State-by-State basis. If you move from one State to another, your rates will go up or down depending upon the law and the experience in that State. That is not true of product liability insurance. If you move your manufacturing facility from one State to another, your product liability insurance rates are going to remain absolutely constant, and they need to, because insurers must rate you on the basis of nationwide data.

Resolving this through the courts has resulted in a crazy quilt. One court says one thing; another court says something else; another court says still something else. The circuits have been overloaded. When legislatures have tried to resolve the problem they are faced with the argument that Mr. Bendorf and others have made, that all are doing is cutting off consumer rights in our State. You are not really doing anything for product.

So I think that CFA made a persuasive argument on another issue in an earlier hearing in favor of the type of approach that you are embarked on.

Senator **Kasten**. Mr. Sloane?

Mr. **Sloane**. I think the interstate dimensions of the product liability problem for smaller product sellers, for example like Mr. Voss, are clear. Mr. Voss' products are in 20 different States at least at this point. He has no control over where those products are going, who is using those products, what rules of law will be judging those products. And to try to put together an insurance package that can cover that kind of uncertainty is an absolutely impossible undertaking for a small businessman.

There is another point I would like to make in that area. With regard to Mr. Greenberg's mention of the classic hunting tort case, one of the problems in strict liability is that we are not out there firing any bullets at all. We are being brought in to product liability actions in which, statistics show wholesaler-distributors are typically dropped out of these cases down the road. The costs that they incur never go toward any plaintiff, nor toward any consumer that might be injured by a product.

They are going strictly to lawyers. We think that strict liability, as Mr. Sales pointed out, is a gross inequity, and it is a growing monster that has to be stopped, because it is causing severe problems for smaller businessmen.

Senator **Kasten**. Would anyone else care to comment on the State by State versus Federal approach? And then I will just ask you to summarize, David. Yes, Mr. McCarthy?

Mr. **McCarthy**. State by State—in New Jersey for example, the judge just ruled 2 days ago that we could not bring any evidence regarding the employer or employee into our trial on an injury that had occurred on a product that had been out in the marketplace for 20 years, because the plaintiff's allegation was on strict design. So we the manufacturer could absolutely not bring any evidence in front of that court except answering the question of why it was defective in design 20 years ago, when it left our manufacture.

And yet, the injury to the employee was caused by a component added to the machine that had nothing to do with its manufacture over 20 years ago.

You go to a lawsuit in New York, 10 miles away, and just the opposite is true. There you can bring evidence against the employer and whoever is at fault for adding the component, and you are able to try him in the courts of New York, where you cannot in New Jersey. You just go from one hodge-podge to another in the courts and trials, and it just does not make any sense at all.

Senator **Kasten**. Does anyone else on the panel wish to comment? Mr. Greenberg?

Mr. **Greenberg**. Mr. Chairman, after listening to the testimony today and hearing about the testimony on Tuesday, I am convinced that all participants here in a sense are victims. I think that the wrongdoers in many cases in this whole field—not necessarily intentional wrongdoers, but wrongdoers nevertheless—are in the insurance industry. It seems to me that a national solution may well be required in this product liability area, and that national solution, the one that will have the most direct impact on premium increases for manufacturers and wholesalers and the one that would least affect the ability of consumers to be compensated for serious injuries involves a national solution to this insurance problem.

Mr. Chairman, the problem we see is one of safety. Last year the National Safety Council estimated 23 million household injuries alone, admittedly not all of those from products. But if one-tenth of those 23 million injuries came from products, that is 2.3 million product-related injuries a year. And you cited figures suggesting that last year only 9,000 or 7,000 of those cases ended up in Federal court.

So it is a problem of insurance. It is a problem of safety. And even should this legislation be passed, we will have a continuing problem of uncertainty. There will be uncertainty both in the application of terms and I fear there will be uncertainty on behalf of purchasers who are afraid that products will no longer be as safe.

Senator **Kasten**. Did you want to comment very briefly, Mr. Sloane?

Mr. **Sloane**. Very briefly, I just wanted to say that what was discussed earlier about the explosion in the number of product liability cases I do not think would point out that it is an insurance problem. I think it points out very clearly that there is a grave legal problem out there.

Senator **Kasten**. I would like to ask one question of Mr. Goetz, Mr. Voss, and Mr. McCarthy. There is some evidence that the increasing cost of product liability insurance and the increasing problems with product liability have caused manufacturers to become less enthusiastic about developing newer, safer, or better products or product lines, because the 1981 product can be used as evidence that the 1965 product, now the subject of some kind of a legal battle could have been made safer.

Mr. Goetz, you suggested that your safe designs are always being compared back and forth. But is there evidence in your industry, and I would appreciate specific examples, of where you have made a decision not to go into a new or an expanded product line, and in particular not to go into an area where the product or product line could be safer, simply because of the danger of that newer or safer or more efficient product then being used against you?

I understand this is not the easiest question to answer, but I would like to just get a sense if you understand the problem that I am talking about.

Mr. **Goetz**. Let me, Mr. Chairman, see if I can answer that by sharing one specific happening at Cincinnati, Inc. The corporation was interested in purchasing another small company to broaden our product base. It was a company that we felt our engineering and our finances would make a great addition to that particular company, because they were in difficulty.

It was my recommendation that we not go into that kind of purchase because of the product liability exposure we would be picking up from that company's products in the field. And the decision was that we should not expand our product line in that area through an acquisition. I do not know what has happened to that company since that time. We just did not buy it. The major reason for not buying it was the product liability exposure caused by that company's products already in the field.

Senator KASTEN. Mr. Voss, could you comment on this? Although I know that you are a wholesaler, and that this does not directly affect you.

Mr. VOSS. As a distributor, we are not responsible for the design or the manufacture. I do know that the manufacturer of our product line has definitely not brought certain products to the marketplace because of the concern over product liability.

I think as a distributor, though, our great concern is the case that I mentioned in my testimony from the dealer in Philadelphia with an $18.8 million judgment. If this carries, it will be devastating to material handling equipment dealers, absolutely devastating. There is nothing like this on the horizon. I can imagine what it will mean to all dealers' insurance rates. I do not know the particulars of this case, but the dealer did not even sell the product directly to the user who had the injury or the user company.

So it is very distressful.

Senator KASTEN. Mr. McCarthy?

Mr. McCARTHY. Mr. Chairman, I failed to mention, we have 150 employees. Our total sales are about $10 million, and when you look at $850,000 you can see we spend 8.5 cents out of every dollar that comes in, and so we are not very much larger than Mr. Voss' company, with 150 employees.

But to answer your question, we put safety in our products and have for years and continue to do so. But it makes absolutely no difference in the courtroom. In back-to-back lawsuits in California, I had one product that had the safety build right into it and it happened to be involved in an injury to a woman causing her to have a six-finger amputation, because they (her employer) failed to use the safety device.

I was there in the second lawsuit with a press brake built 40 years ago, on which an employee had an injury. In this case, the court allowed every single sentence that had ever been published by Dreis & Krump and other manufacturers as evidence against us, from 1940 until 1980 when the case was tried. The first lawsuit, with the safety devices, the court precluded any evidence of the safety devices being put on the machine as an argument against the alleged design defect, because all the court was interested in was what happened with the article being used and not what we did. No safety manuals, no warning signs; nothing was to be given to the jury at all.

So here you build a product, you put all these safety-related things into it and you cannot even get that in as evidence in one court.

Two months later, in the second case, they put everything in, and that is the hodge-podge of the judgments which go on throughout the United States. There is no certainty in this product liability litigation arena at all, and what we need is balance and judgment in the these legal situations.

Senator KASTEN. I would like to thank all of you for your testimony this morning. There may be additional questions from the staff or members of the committee, and in that case we hope that you can get back to us with responses to those questions in a timely fashion. Thank you all very much for your participation here this morning.

Mr. **Greenberg**. Thank you.

Mr. **Sloane**. Thank you.

Senator **Kasten**. The next panel includes Mr. McKeon, Mr. Sevier, and Mr. Keeley. Our first statement from this third panel is from John McKeon, who is the vice president of FMC Corp.

STATEMENTS OF JOHN F. McKEON, BUSINESS ROUNDTABLE, VICE PRESIDENT, FMC CORP., ACCOMPANIED BY PATRICK J. HEAD, VICE PRESIDENT AND GENERAL COUNSEL, AND EVERETT M. HOLLIS, COUNSEL; ERNEST Y. SEVIER, CHAIRMAN-ELECT OF THE SECTION OF TORT AND INSURANCE PRACTICE, AMERICAN BAR ASSOCIATION; AND GEORGE W. KEELEY, COUNSEL, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS

Mr. **McKeon**. Thank you, Mr. Chairman. My name is John F. McKeon. I am appearing today on behalf of the Business Roundtable. I am a vice president of FMC Corp. and I am general manager of their construction equipment group. Accompanying me here are Mr. Patrick Head, vice president and general counsel of FMC, Mr. Everett M. Hollis, counsel.

I am pleased to have this opportunity to present the concerns of the Business Roundtable's task force on product liability to this committee. The task force on product liability was founded in October 1981 to support efforts to achieve an equitable reform of the product liability tort system. The task force consists of the chief executive officers of 12 Fortune 500 companies, including pharmaceutical, chemical, automobile, diversified machinery and consumer product manufacturers, and wholesale and retail distributors. The fact that such a diverse group has been able to achieve a consensus on such complex issues underscores the importance that task force member companies attach to the need for product liability reform.

My statement this morning will focus on two aspects of the product liability reform issue. First, it will describe how the uncertainty of existing State product liability laws is detrimental to the American businessman and to the consumer alike. Second, it will explain why a single uniform product liability law is needed and address the ultimate concerns related to it.

Today there is no single standard of liability for products. Instead, a businessman or manufacturer potentially faces different standards for liability in each of the 50 States. For example, in 1970 FMC was sued in the State of Illinois for personal injuries when a heavy equipment operator maneuvered the boom of an FMC link belt crane into high power, high voltage lines. That incident resulted in a jury award against FMC for $2.6 million. Subsequent to the affirmation of that award by an Illinois appellate court, the supreme court of two other States, Minnesota and New Mexico, held in similar cases involving other crane manufacturers that the manufacturer was not liable because the hazard of driving a steel boom into high-power lines was obvious.

This wide variation among State product liability laws and court decisions limits the ability of manufacturers to design and distribute products for nationwide sale. This restraint is detrimental to manufacturers, product sellers, workers, and consumers. Manufacturers and their insurers are unable to predict potential liability and in many cases may be discouraged from improving their products.

Workers and consumers not only must ultimately pay the costs of product liability judgments, but also are faced with such wide differences in policy among State laws that their ability to recover legitimate damages is impeded.

Additionally, the very concept of liability for products has been expanded dramatically in recent years. Historically, it has been necessary to prove that a manufacturer had been negligent—that he had not acted as a reasonably prudent manufacturer would have acted—in order to find him liable for damage resulting from injuries or loss sustained while operating or using the product.

Now, in less than 20 years court decisions have extended a manufacturer's liability to cover any injury without regard to fault. This is the concept of strict liability. Under that concept, liability may be imposed on a manufacturer without regard to the reasonableness of its actions. A recent court decision noted that a company "will not be shielded by the fact that it and its employees put forth their best and most meticulous efforts."

In some States, the concept of strict liability has been extended to products modified by an owner or employee in contradiction of the manufacturer's design or specifications. The manufacturer may be found liable on the ground that he should have anticipated that such changes might be made and therefore that he should have taken steps to prevent such modifications.

In a few States, the fact that a manufacturer alters an existing product line may be used as evidence that the original product was defective, even though the modified product may incorporate improvements based on technological advances that had not been recognized when the earlier product was manufactured.

Let me give the committee an example of how the strict liability concept could be applied. A crane manufacturer sells one of its products to a construction company, providing operating guidelines about the crane's use. The construction company uses the crane without incident or harm throughout the machine's useful life, and then sells the crane to another company. Under the concept of strict liability, the manufacturer of that crane, which now might be 25 to 30 years old, may be liable for an injury sustained when the second owner operates the crane for purposes for which it was not designed and without the safety equipment originally installed by the manufacturer.

Expansion of strict liability or liability without fault has blurred the distinction between strict liability and absolute liability. Strict liability requires only a determination that the product was hazardous. If the claimant were injured, then the product must have been hazardous. Evidence of care taken by the manufacturer is irrelevant. However, strict liability does not provide any standard for product safety. As a result, a manufacturer faces a case-by-case liability determination of both its design and manufacture.

Product liability tort reform can be accomplished in two ways: Through the enactment of individual State law or through enactment of a single uniform law. The Carter administration chose the former approach, proposing a uniform product liability law for adoption by the States. To date, no State has enacted that law. Twenty-eight States, however, have enacted some form of product liability reform law, and in general the issue is growing more complex. The second alternative, of course, is the enactment of a Federal law, and that is the one we favor.

In conclusion, the task force has a number of suggestions for inclusion in product liability legislation. These suggestions go to the heart of the product liability problem. The Business Roundtable respectfully requests that these suggestions, contained in its recommendations paper, be entered into the hearing record.

The Business Roundtable believes that failure to take Federal action to resolve the dilemma of conflicting product liability law from State to State will create increasing problems that will be harmful to companies and to consumers alike. There is a need for a comprehensive and balanced approach to solve a national problem once and for all by enacting Federal product liability legislation.

Thank you.

Senator KASTEN. Thank you, Mr. McKeon, and the information that you have provided will become part of the record. I would also like to thank you and the others for all your help as we have progressed through these various drafts, and we look forward to working with you in the future.

The next witness is Ernest Y. Sevier, the chairman-elect of the section of tort and insurance practice of the American Bar Association. Mr. Sevier.

Mr. SEVIER. Thank you, Mr. Chairman. My name is Ernest Sevier and I am chairman-elect of the American Bar Association's section of tort and insurance practice. I have been asked by ABA President David Brink to appear on behalf of the association, whose membership today is in excess of 292,000, in opposition to this and any Federal legislation that preempts State court and legislative law in the product liability field.

The association's position is expressed in a resolution passed by the house of delegates, the ABA's legislative body, by a voice vote without any stated opposition 1 year ago in February of 1981. The resolution, together with an accompanying report, both of which are attached to my statement, were submitted to the house of delegates by our section of tort and insurance practice after having been unanimously passed by the executive council of our section.

Since then, with the advent of proposed legislation in both the House and Senate, our section was asked to reconsider our position, and again the council, now with a slightly different makeup, voted unanimously to oppose Federal preemptive legislation.

As is shown in the report accompanying the resolution to the house of delegates, the American Bar Association's opposition to Federal preemptive legislation is based upon the proposition that the law of product liability historically and correctly rests with the States. The strength of the great English common law system which we have inherited is its evolution through trial and error of laws that reflect the changing times and at the same time give us precedents upon which we may rely.

We have stability and at the same time we have change. From time to time, the court case law is supplemented by State legislation, a phenomenon that is presently occurring in the majority of the States in the product liability field. The case law and the State statutes are not perfect, but they are ever evolving and adapting to changing conditions. Sometimes they may not proceed as fast as some might desire, but evolution rather than revolution is the system's strength.

As States differ in social and economic philosophies and needs, their product liability laws reflect these differences. Each State, through its courts and legislatures, is best able to evaluate the needs and desire of its populace. That has been historically true and it is the basis for the recent emphasis or reemphasis on Federalism.

Prior ventures by Congress into the preemptive legislative field in the liability field, such as in the automobile liability field, have ended up with the realization to leave it to the States, for the reasons I have stated.

Comments made this morning cite unfairness to a manufacturer, being adversely affected by more liberal product liability rulesin States outside of the State of manufacture. Yet, two of the States you have singled out or have been singled out as having unfair rules are two of the largest manufacturing States in the Union, California, and New York.

We neither approve nor disapprove the rules of law which you are incorporating in your proposed act. Nor do we oppose enactment of its rules or model acts by any States. However, your staff draft No. 2, which upon review—and I reviewed Draft No. 1 also—obviously has been thoroughly prepared yet and gives examples of the problems that any preemptive legislation, Federal legislation, will present if enacted.

Whether left to the State courts, as you propose, or to the Federal courts, it is inevitable that we will be left with varying interpretations by the courts, probably along the same philosophic lines as the present State laws.

There will be challenges to the validity of the act, wholly or partially. An example is one of the central features of your proposed legislation, the statute of repose or cut-out provisions after a certain number of years after manufacture. In the construction field, similar statutes have been ultimately alternately upheld or stricken down by the various State courts. In the meantime, while the courts' interpretations proceed, we will be left with uncertainty rather than certainty, which you desire.

Conflicting provisions with the State laws in related fields, such as automobile law, in frequent automobile and product liability combined lawsuits with those in this act or any Federal act will cause serious inconsistencies and potential injustices. Comparative negligence will conflict with modified forms. Punitive damage prerequisites will conflict with those of some of the States or the absence thereof in at least one State.

Mr. Sales commented this morning that this was a contribution or indemnity problem. I submit to you that in the situation I am talking about, where you have codefendants in the same lawsuit, the same defendants in the dock before the jury, that they are being submitted to different rules of law regarding their conduct.

In conclusion, we respectfully submit that history, stability, and different State social and economic needs and philosophies require you to leave the product liability law where it is and should be, with the States. Thank you very much, sir.

Senator **Kasten**. Thank you for your testimony. I just want to ask Mr. Sevier one question. You represent the American Bar Association, is that correct?

Mr. **Sevier**. That is correct.

Senator **Kasten**. Or do you represent a subcommittee?

Mr. **Sevier**. A section.

Senator **Kasten**. You are testifying on behalf of whom, exactly?

Mr. **Sevier**. The American Bar Association, David Brink, president, American Bar Association. The house of delegates, which is the legislative body of the American Bar Association, passed the resolution. Our section, which is a section of approximately 19,000 members, the tort and insurance practice section, sponsored the bill to the house of delegates last year at the midwinter meeting in eastern Texas. It was passed by the House of Delegates and then became the official position of the American Bar Association.[1]

Now, Mr. Brink as the president either has the right to appear or select whoever he wishes to appear on his behalf, and Mr. Brink selected our section to appear to represent the position of the American Bar Association since we were the sponsoring section of the resolution to the house which was adopted.

I hope that I——

Senator **Kasten**. I just wanted to clairfy that point because as you know, this morning we have had a large number of lawyers. I would assume they are all members of the ABA. And they have been on all sides of this issue. It seems to me to be inconsistent that the American Bar Association takes such a strong position against this kind of legislation, when my personal feeling is that the average member of the average "Main Street" law firm around this country is supportive, at least judging from the letters we have received.

Mr. **Sevier**. May I answer that, Senator, please? First of all, I would respectfully disagree that the majority agree with your position. But I think it works kind of like the U.S. Senate, Mr. Chairman, in that the legislative body that adopted this was the house of delegates, which in turn comes from varying organizations, comes from varying legal organizations around the country, bar associations from each State, various types of bar organizations. It is a very complicated situation, but an attempt to try to represent as many factors of the bar across the United States.

Senator **Kasten**. The tort and insurance practice group, that group is made up of people who are lawyers in that area. So is it fair to say that that group would be essentially trial lawyers? So essentially you have a group of trial lawyers that have established a position, and then you took that resolution into the larger group and won, is that correct?

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[1] But see letter of David R. Brink, April 27, 1982, indicating "some groups [within the ABA] are already working to change policy." p. 178.

Mr. Sevier. That is correct. And we have representatives in our section of the plaintiffs' bar, the defense bar, and the insurance industry.

Senator Kasten. Is there a group that smalltown Main Street lawyers that would be in opposition to your tort and insurance practice group?

Mr. Sevier. Well, there is a general practice section, which is a section of approximately 15,000 lawyers. They have a delegate to the house of delegates, the same as we have. And also, members of their organization, members of the house of delegates from other branches, have State bars and so forth. So they were represented.

We have tried through the makeup of the house of delegates—you know, it would take some time to explain the entire makeup, but to represent small bar associations, large bar associations, State bar associations, national bar associations, et cetera. So I believe through the years it has acquired a mix of representation of the bar.

[The statement follows:]

STATEMENT OF ERNEST Y. SEVIER, CHAIRMAN-ELECT, SECTION OF TORT AND INSURANCE PRACTICE ON BEHALF OF THE AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Subcommitte, we appreciate the opportunity to present this testimony to you on behalf of the American Bar Association. I am Ernest Sevier, Chairman-Elect of the Section of Tort and Insurance Practice. I am here at the request of the President of the American Bar Association, David Brink, to express to you the Association's opposition to federal legislation preempting current state regulations or state case law in the area of product liability.

In February, 1981, the House of Delegates of the American Bar Association adopted a resolution opposing any federal legislation which would make a model act such as the Model Uniform Product Liability Act, published October 31, 1979 by the Department of Commerce, or any other subsequent legislation based on the Model Act, a federal law. The proposed Staff Working Draft No. 2 is precisely the type of legislation which we oppose.

The law of products liability has historically been a product of the common law developed by the state courts supplemented by state legislation. This example of the strength of our legal system has through trial and error evolved bodies of law in the products liability field which meet the particular social and economic needs of each of the states. As states we are different, and our specific requirements have been developed and decided where they are best understood: at the state level.

The wisdom of this result was reinforced in the late 1960s in connection with proposed federal legislation which would preempt the states' laws in the automobile liability field. After considerable study and hearings, Congress wisely decided to leave the matter with the States. Indeed, it is incongruous that you should again be considering usurping the states' liability laws in another field in the 1980s when the trend is clearly away from federal control and toward state control.

Despite the manufacturers' argument that product liability deals more with national concerns due to the dissemination of products over the various states and territories, in our ever mobile society, it is difficult to distinguish any valid distinction from the law of automobile liability, for automobile policies are issued in one state and accidents occur in other states. Furthermore, the major industrial states involved in the manufacture of products are far outnumbered by the states that are primarily consumers.

The states have not been unmindful of the so-called "products liability crisis" of the middle-to-late 1970s. Many states have enacted remedial legislation and other state legislation is presently pending. A discussion of the legislative activities as of February, 1981 is found in the attached February 1981 report of the Section of Tort and Insurance Practice to the House of Delegates. Although we do not have up-to-date report to submit to you, 28 states so far have presently enacted statutes in the field. Not all of these are perfect and undoubtedly additional changes and supplements will have to be made by the states in the future. However, this is all part of the trial and error process that has developed over the years to give us the stability of ever-evolving bodies of law.

By this proposed Staff Working Draft No. 2, or any other federal legislation preempting the field, you will be introducing uncertainty and instability, exactly the opposite of your desired result and exactly the opposite of what the states have provided. Attorneys have found that with every new piece of legislation that preempts the fields and does away with the existing evolved body of law, a whole new area of litigation is presented. Furthermore, the public is deprived of the certainty that has been developed. I would like to give you some examples of the uncertainty and instability that will be developed by this preemtion of state laws that is proposed.

1. Constitutionality of the Act in whole or in part will be raised in the various states and jurisdictions where the law will apply. It will be argued that the Act violates the separation of powers provided in the Bill of Rights. It will also be argued that equal protection of the law is not provided since a class of tortfeasors and potential plaintiffs have been singled out for separate treatment.

The proposed legislation contains a statute of repose. Similar statutes of repose have been enacted in other fields of liability in the various states and their constitutionality has been diversely upheld and struck down.

2. Any act, no matter how perfectly drawn (and it is obvious that considerable effort has been made in developing the present Staff Working Draft No. 2), will always raise questions of interpretation of statutory language. The different states will make different interpretations of the various portions of the statute which will depend upon the particular social and economic background and need of each state.

Although the proposed legislation leaves interpretation to the state courts, the same problem would be raised if the matter were transferred to the federal court system. There would be the question of whether the federal court would have to apply state law in its interpretation of federal law. Again, there would be variations from district to district and circuit to circuit. By not considering the federal court alternative, you have undoubtedly borne in mind the recent trend toward limiting federal court jurisdiction rather than expanding it.

A good example of judicial interpretation is in the area of statutes of limitations. The proposed Act has a specific statute of limitations. As statutes of limitation are not favored defenses by the courts, this statute, as with existing statutes, will be subject to interpretation by the courts and those interpretations will vary from state to state depending upon their particular philosophy.

In short, by throwing out the existing evolved common law and statutory enactments by the states and replacing them with a new federal statute, you have caused us to start at the beginning to develop a body of law upon which all involved can rely.

3. Products liability law does not always function alone in a lawsuit. For example, automobile accident claims frequently involve both automobile liability and products liability.

Your proposed Act provides for punitive damages under defined circumstances. Some states, such as Louisiana, provide for no punitive damages. Other states have different definitions for punitive damages. In a mixed products automobile liability case, the potential for confusion and uneven results exists.

The proposed Act calls for "pure" comparative negligence, which so far has only been adopted in 11 states. Other states have modified forms of comparative negligence such as the Wisconsin rule. Again, using the example of the automobile/products liability case, you will be presenting conflicting rules of comparative negligence in by far the majority of jurisdictions. Additionally, each state has developed its own set of rules, which vary considerably, regarding the set-offs, separate settlements, joinder, contribution and indemnity.

In conclusion, we strongly feel that stability and certainty, as well as being able to continue to respond to the varying and different needs of the citizenry of this large and diverse country require you to leave the control of the law of products liability where it has historically belonged and should belong: to the states.

We thank the Chairman and the Subcommittee for permitting us to present these views.

Attachment.

AMERICAN BAR ASSOCIATION, SECTION OF TORT AND INSURANCE PRACTICE REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

Be it resolved, That the American Bar Association opposes enactment of legislation such as H.R. 7921, 96th Congress, which would impose a Model Products Liability proposal as federal law.

REPORT

Numerous bills were introduced into the 96th Congress concerning product liability; two such bills were H.R. 5626, the National Product Liability Act and H.R. 7000, the Uniform Product Liability Act. The former Act was drafted by the National Product Liability Council while H.R. 7000 was based upon the Model Uniform Product Liability Act drafted by the U.S. Department of Commerce. The Model Act drafted by the U.S. Department of Commerce was published in the Federal Register on October 31, 1979, and was offered by the Department as a Model law for voluntary use by the states.

After extensive hearings by the Congress on the issue of product liability, such as the hearings held by the Subcommittee on Consumer Protection and Finance of the Interstate and Foreign Commerce Committee of the House of Representatives, the Product Liability Act of 1980, H.R. 7921, was introduced into the House of Representatives on August 1, 1980. This Act was deemed by the sponsors to constitute the best compromise legislation on the issue based upon the hearings held on all the previous legislation introduced into Congress. H.R. 7921 attempts to address the major areas of uncertainty in product liability law including; design defect cases, failure to warn cases, product alteration cases, product modification cases, limitations on actions against old age products, the relationship between worker compensation benefits and product liability, punitive damages, and unavoidably dangerous aspects of products. It also attempts to strike a fair balance among the interests of consumers, manufacturers and insurers. The legislation would pre-empt all current state regulations in the area of product liability as well as state case law that is contrary to it. The major difference between H.R. 7921 and the Model Uniform Product Liability Act of the Department of Commerce is in the area of useful safe life. H.R. 7921 abandons the concept that products would be presumed to have a safe life of ten years for the concept that they are presumed not to be defective. This presumption could be overcome by clear and convincing evidence arising out of a lawsuit involving the products. There are also exceptions to the presumption so that products having caused the same or similar injuries would not get protections for later lawsuits. Also, non-manufacturing sellers would be insulated for product claims directed at manufacturers unless the manufacturer is not available for suit.

The legislation adopts a standard of comparative fault so that liability is specifically proportioned to responsibility. It also distinguishes between the causes of defects in products depending upon whether the defects were caused by unsafe construction, unsafe design, inadequate warnings or non-conformance with warranties. Manufacturers would be able to assert that there were "unavoidable dangers" associated with use of the product as well as lack of technical flexibility for alternative designs. Products in compliance with regulatory standards would be presumed to be safe, although this could be rebutted, while products in non-compliance would be presumed defective.

The Section, however, believes that any federal legislation which would make a model act such as the Model Uniform Product Liability Act published by the Department of Commerce or any other subsequent legislation based on the Model Act a federal law should be opposed. A substantial number of states have recently enacted remedial product liability legislation. In reviewing this recent legislation, it is apparent that the states have some common and some different needs in so far as products liability reform is concerned.

Since the so-called "product liability insurance crisis," which began in the mid to late 1970's, many states have enacted remedial legislation, and such legislation is presently pending before numerous state legislative bodies.

While the language of the remedial legislation varies from state to state, there is a certain consistency in the categories into which these various provisions fit. These categories are as follows:

1. *Restatement of Torts, Section 402A.* This includes statutes which have specifically adopted the language of the Restatement for the definition of strict liability in tort. Some state statutes have also required that the Comments to the Restatement be used in interpreting the Rule.
2. *Unreasonably Dangerous Required.* Some state statutes specifically require that the product be proven to be unreasonably dangerous in order to establish liability. This is, of course, required in those states that have enacted the Restatement Rule as a whole.
3. *Statutes of Limitation.* Statutes have been passed that have placed a maximum period of exposure to products liability claims. These are generally called statutes of ultimate repose.

4. *Alteration and Modification Defense.* These are statutes that limit or exclude liability when the product has been susequently altered by someone other than the manufacturer or seller.

5. *State of the Art.* Some statutes limit or exclude liability if the product was designed in accordance with the existing state of the art at the time of the product's manufacture. This is generally thought of as a state of the art defense. Other statutes provide for a disputable presumption that the product is not defective if manufactured in accordance with the existing state of the art. Still other states have enacted statutes which exclude evidence of subsequent product changes or changes in the state of the art.

6. *Original Package Defense.* A defense is given by these statutes to sellers who resell a product in its original package with no reasonable way of determining if the product might be defective.

7. *Contributory or comparative negligence defense.* Some states have adopted by statute defense of either contributory or comparative negligence for a product liability cases.

8. *Government Regulations Presumption.* Some states provide for a disputable presumption that a product is not defective if manufactured in accordance with governmental statutes or regulations existing at the time of the manufacture.

9. *Non-Defective Rebuttable Presumption.* Some statutes provide for a disputable presumption that the product is not defective or unreasonably dangerous without any foundation proof.

Given these categories, the following is an approximate present status of the state statutes:

1. *Restatement Section 402A.* Arkansas, Section 402A alone, ASA 85-2-318.2; Indiana, Section 402A alone, IC 33-1-1.5-5; Maine, Section 402A alone, 14 M. RSA. Section 221; Oregon, Section 402A and Comments, SB 422 (Jul. 1979); South Carolina, Section 402A and Comments, Code 1976, 15-73-10 to;

2. *Unreasonably Dangerous Required.* Nebraska, Unreasonably Dangerous, Neb RS 1943; Tennessee, Unreasonably Dangerous, TRS 23-3705; Utah, Unreasonably Dangerous, Utah Code 78-15.6.

3. *Statutes of Ultimate Repose* Arizona. *12 years, ARS 12-551; Connecticut, 10 years, PA 79-483; Florida, 12 years, FA 95.031; Georgia, 10 years, GC 105-106; Illinois, 10/12 years, IRS, Ch 83, § 21.2; Indiana, 10 years, IC 33-1-1.5-5; New Hampshire, 12 years, NHRSA 5-7-D: 2; North Carolina, 6 years, 1979, Ch 654; North Dakota 10 years, HB 1075 (1979); Nebraska, 10 years, NRS 25-702; Oregon, 8 years, ORS 30.905; Rhode Island, 10 years, Ch 9-1-31; South Dakota, 6 years, Laws 1978, HB1116; Tennessee, 10 years, Sect. 23-3703; Utah, 6/10 years, UC 78-15.3.*

4. *Alteration and Modification Defense.* Arizona, Alteration and Modification Defense, ARS 12-683; Arkansas, Alteration and Modification Defense; Connecticut, Alteration and Modification Defense, PA 79-483; Georgia, Alteration and Modification Defense, GC 105-106; Indiana, Alteration and Modification Defense, IC 33-1-1.55(4); Kentucky, Alteration and Modification Defense, KRS Chap. 411; Michigan, Alteration and Modification Defense, Sec. 600.2947; New Hampshire, Alteration and Modification Defense, NHRSA 507-D:3; North Carolina, Alteration and Modification Defense, Ch 654; North Dakota, Alteration and Modification Defense, HB 1075; Oregon, Alteration and Modification Defense, ORS 30.915; Rhode Island, Alteration and Modification Defense, Ch 9-1-31 (b); South Dakota, Alteration and Modification Defense, Laws 1979, SB; Tennessee, Alteration and Modification Defense, Sec. 23-3708; Utah, Alteration and Modification Defense, UC 78-15.5.

5. *State of the Art.* Arizona, Defense, ARS 12-683; Arkansas, Defense, ASA; Indiana, Defense, IC33-1-1-5-5(4); New Hampshire, Defense, NHRS 507-D:4; Nebraska, Defense, NRS 25-21, 182; Tennessee, Defense, Sect. 23-3705; Colorado, Presumption, CRS 13-21-402; Kentucky, Presumption, KRS Ch 411, Sect. 2; North Dakota, Presumption, HB 1075; Arizona, Evidence Exclusion Rule, ARS 12-683; Kentucky, Evidence Exclusion Rule, KRS Ch 411, Sec 5; Michigan, Evidence Exclusion Rule, Sec 600. 2946(3); Nebraska, Evidence Exclusion Rule, NRS——.

6. *Original Package Defense.* Kentucky, Original Package Defense, KRS Ch 411, Sec 6; North Carolina, Original Package Defense, Ch 654; South Dakota, Original Package Defense, Laws 1979, SB 67; Tennessee, Original Package Defense, Sec 23-370.

7. *Contributory/Comparative Negligence.* Connecticut, Compartive, PA 79-483; Indiana, Contributory, IC 33-1-1.5-5; Kentucky, Contributory, KRS Ch 411, Sec 3; Michigan, Comparative, Sec 600.2949(1); North Carolina, Contributory, Ch 654; Nebraska, Comparative, NRS——; Oregon, Comparative, ORS 18.470.

8. *Govt. Regulations Rebuttable Presumption.* Tennessee, Govt. Regulations Rebuttable Presumption, Sec. 23-3704; Utah, Govt. Regulations Rebuttable Presumption, UC 78-15.6.

9. *Non-Defective Rebuttable Presumption.* Kentucky, Non-Defective Rebuttable Presumption, KRS Ch 411, Sec 1; Oregon, Non-Defective Rebuttable Presumption, ORS 30.910.

10. *Miscellaneous.* Michigan, 10 yr. rebuttable presumption, Sec 600.5805; Minnesota, Useful Life of Product Def., Sec 604.031; Tennessee, No duty to warn of obvious, conditions, Sec. 23-3705.

Since a substantial number of states have enacted remedial legislation in the area of product liability, it is the belief of the Section that any federal legislation which would make a model law federal law would be opposed.

Respectfully submitted.

B. C. Hart, *Chairman.*

February 1981.

[The following information was subsequently received for the record:]

American Bar Association,
San Francisco, Calif., April 8, 1982.

Hon. Robert W. Kasten, Jr.,
Chairman, Consumer Subcommittee, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

Dear Mr. Chairman: During my testimony on behalf of the American Bar Association on March 12, 1982, you asked whether the ABA opposes enactment of a model product liability law on the state level. I want to make it clear that the ABA has not taken a position either in opposition to or in favor of any state adopting such a statute. We believe that such a decision should be left to the individual states.

You also asked about the composition of the House of Delegates which formulated the official ABA position. The House of Delegates consists of 382 members which represent not only various groups within the Association, but also the legal profession as a whole. Its membership is elected by Association members in each state, delegates from every state bar association, the larger local bar associations, other affiliated national organizations of the legal profession, and delegates elected by the Assembly and by the Sections. A list of the affiliated organizations is attached. The Attorney General and the Director of the Administrative Office of the U.S. Courts are members of the House by virtue of their office.

The procedures the House follows for formulating positions are found in the ABA Policy and Procedures Handbook. Attached is a copy of an excerpt from that Handbook discussing this matter.

I request that this letter be included in the record of the March 12 hearings in order to supplement my oral testimony.

Thank you again for allowing us to state the ABA's position in opposition to Federal preemptive legislation in the products liability law field.

Sincerely,

Ernest Y. Sevier,
Chairman-elect,
Section of Tort and Insurance Practice.

Senator Kasten. Our next speaker is George Keeley, an attorney from Chicago, Ill. Mr. Keeley.

Mr. Keeley. Good morning, Mr. Chairman. My name is George Keeley and I am a member of the law firm Halpenny, Hahn & Roche in Chicago, Ill., and legal counsel to the National Association of Wholesaler-Distributors.

I might add that I am a member of the American Bar Association. I guess the ABA is like any form of democracy; it is not perfect and you can never reflect all the views of all the members of an association, whether it is a legal profession or a business one.

But I can say on behalf of the clients that it has been our privilege to represent, we do feel product liability is a serious problem and we do feel uniformity and certainty would aid the business people we represent, and that the Federal approach is the only pragmatic solution to this problem.

I do appreciate the subcommittee's invitation today to participate in these hearings, and the subcommittee and its chairman are to be complimented on their hard work in preparing staff working draft Nos. 1 and 2. These drafts are a fair, reasonable, and impartial solution to the product liability problem, and they take into account the public comments of many diverse interests. Further, these drafts do trace their conceptual origin to the Model Uniform Product Liability Act, which was the work product of the Commerce Department following its own exhaustive study of this problem.

My written statement has been submitted to the subcommittee and I request that it be made a part of the record. I would like to summarize two or three of the major points which were made in the written statement.

First of all, there is a product liability problem in this Nation, and the problem is particularly severe for small businesses, which represent a majority of NAW's membership. This was the conclusion reached following congressional hearings by Congressman LaFalce in the House Subcommittee on Capital, Investment and Business Opportunities of the Committee on Small Business.

Furthermore, we note the U.S. Department of Commerce found that the development of product liability laws on a case-by-case basis in the various State courts has left the law lacking in uniformity and stability, to the detriment of product sellers, product insurers, and product users alike. The lack of uniformity and uncertainty can be traced directly to the development judicially of the doctrine of strict liability in tort.

Mr. Sales has discussed in great detail the workings of this new court-created doctrine, and I will not repeat it, except to point out that strict liability imposes liability not only on manufacturers but the liability is imposed on wholesaler-distributors and retailers and other nonmanufacturers as well. Wholesaler-distributors find themselves involved in product liability suits for products which they sold and which passed unopened through their warehouse.

The case of *Dunham* v. *Vaughn & Bushnell Mfg. Co.* in the State of Illinois, where the Illinois Supreme Court held a distributor strictly liabilic for a defective hammer that passed unopened through his warehouse is a prime example of the unfairness the doctrine currently has. In fact, there have been cases where the wholesaler-distributor has been involved in a court case and never even had physical possession of the product at issue. The product, rather, has been directly shipped from the supplier to the end user.

We submit to the subcommittee that the involvement of wholesaler-distributors in product liability suits is unnecessary. It increases transaction costs. It creates expenses which benefit only the legal profession and the trial bar. For many of our wholesaler-distributors the involvement in the suit is nothing more than a nuisance, an opportunity to try and settle the case out at some nominal amount and end the litigation.

Mr. Voss' testimony this morning indicates it is not always possible to get out of the product liability suits at the outset, but for the most part, according to the Insurance Service Office study, only about 5 percent of the cases involve any claims payment by a wholesaler-distributor. The remainder of these cases simply involve the wasteful expenditure of transaction costs, costs of defense by a nonmanufacturer.

My second major point is that certainty in the law requires legislative action, and that uniformity in the law among the States requires that legislative action to be taken at the Federal level. Under the present system it is virtually impossible for a wholesaler-distributor to know which set of State product liability laws the product he sells will be judged against. The products are sold and used all over the country.

In fact, today it cannot even be said any more with any certainty that the law of the State where the injury occurred will apply to that case, given the modern choice of law rules. A Federal law will provide uniformity and certainty as to the rules which will decide any product liability action and reduce the burden on interstate commerce.

NAW fully supports the conclusion reached by Congressman LaFalce's subcommittee that the seriously needed uniformity and stability in product liability law can only occur as the result of Federal legislation, interstate compact, or simultaneous State action. Pragmatically, we narrow the choice to Federal legislation. Our experience at the State level indicates that the simultaneous adoption of a uniform State product liability law or any interstate compact is extremely remote.

I have been involved for the last 6 years with the various NAW State task forces in 33 States. I was intimately involved in the efforts in Illinois to enact a statute of repose and a nonmanufacturers' provision. I can say with complete confidence that uniform legislation in the product liability area is not going to occur at the State level. If uniformity and certainty is to be obtained, it must come through Federal actions.

My final point deals with the areas that need to be addressed in Federal product liability legislation. Each critical area we feel is now addressed in the staff drafts, and we urge that they be retained as part of any Federal legislative action. But we would like to register our particular support for section 5 of the staff draft, which places a separate standard of responsibility for wholesaler-distributors and other nonmanufacturers, a standard based upon the duty to exercise reasonable care with respect to the product. This section more than any other section in the staff draft will help alleviate the problems now facing our members.

In conclusion, I would like to thank the subcommittee for their fine work in holding these hearings. It is our hope that you will move ahead on the product liability problem and enact a Federal uniform product liability law.

Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF GEORGE W. KEELEY, COUNSEL, NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS

My name is George W. Keeley. I am a member of the law firm Halfpenny, Hahn & Roche and legal counsel to the National Association of Wholesaler-Distributors (NAW).

NAW has acquired some rather extensive experience with the product liability problem and state legislative efforts to address this problem. Beginning in 1976, I have participated in the formation by NAW of wholesaler-distributor product liability state task forces in 33 states. Each task force was comprised of wholesaler-distributors in the state of all types of products and their purpose was to advocate corrective product liability legislation at the state level. I was involved directly with the efforts of the Illinois Task Force in successfully supporting legislation in Illinois which placed a statute of repose on strict tort liability cases, and which eliminated the application of the strict tort liability theory to wholesaler-distributors and other non-manufacturers in most cases.

Over the years these task forces, in cooperation with other organizations, have obtained reform legislation of varying degree in some 28 states. This six year exercise has made many badly needed improvements in the law, but it must be recognized as a piece-meal approach of open-ended duration. Each state which has acted has addressed some problem areas, but not all which need attention. Moreover, even within a given area, the statutes passed are not uniform which precludes any consistent interpretation among the states. Even if ultimately achieved in all the states, it will nevertheless leave the Nation with 50 different approaches to product liability law.

It has become apparent that uniformity, certainty and fairness in the product liability laws is not going to occur without nationwide application of Federal product liability legislation.

I do appreciate the Subcommittee's invitation to participate in these hearings and discuss the need for federal action to address adequately the product liability problem.

The Subcommittee and its chairman are to be complimented on their hard work in preparing Staff Working Drafts Nos. 1 and 2 to delineate the rules of product responsibility in a flair, reasonable and impartial manner—with a recognition of the principle that such responsibility should be based upon fault. The Drafts are a balanced solution, taking into account the public comments of many diverse interests. Further, these Drafts trace their conceptual origin to the Model Uniform Product Liability Act which was the work product of the Commerce Department, following its own exhaustive study of this problem. In the written remarks I will comment on the three questions posed in Chairman Kasten's letter of invitation dated March 3, 1982.

1. THERE IS A NEED FOR LEGISLATION TO CORRECT THE PRODUCT LIABILITY PROBLEM

A recent report by the House of Representatives, No. 95-977,[1] concluded after extensive public hearings that there is a product liability problem in this Nation, and the problem is particularly severe for small business. The U.S. Department of Commerce found that the development of product liability law on a case-by-case basis in the state courts has left the law lacking in uniformity and stability, to the detriment of product sellers, insurers and users alike.

Legislative action is required to restore uniformity. To accomplish this the Commerce Department's Task Force on Product Liability and Accident Compensation developed a model uniform product liability law for use by the states. The final version of the model uniform law was published in the Federal Register, 44 FR 62714, October 31, 1979, and had the benefit of public scrutiny and comment from 240 organizaitons and individuals, including product manufacturers, product sellers, insurer groups and consumers. In fact a special effort was made by the Task Force to attract comments from product users and consumers through cooperation with the Office of the Special Assistant to the President for Consumer Affairs.

Today's lack of uniformity and certainty in the law can be traced to a rapid revolution in product liability law. Traditionally American tort law has imposed liability only on those parties at fault who are responsible for damage caused to a person not at fault. Now, however, the doctrine of "strict liability" created by the state courts has swept this notion aside. Instead liability is assessed against products sellers—including wholesaler-distributors and other non-manufacturers—even though they have exercised all possible care in the preparation and sale of the product.

The result has been devastating. The strict liability concept has produced a product liability system which is badly out of balance and utterly lacking in equity and commonsense. It no longer fairly decides claims based on responsibility. Rather it has become a compensation mechanism to pay damages whenever someone is injured. Unfortunately, the uncertainty created by this change in the law has produced a virtual lottery for businesses which sell products and must insure against these risks, and for the injured parties involved.

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[1] Subcommittee on Capital Investment and Business Opportunities, House Committee on Small Business, Product Liability Insurance, H.R. Rep. No. 95-977, 95th Cong., 2nd Sess. (1978) (hereafter the "House Subcommittee Report").

We agree with the Commerce Department and the House Subcommittee Report—there is a product liability problem which can only be remedied by a legislative approach.

2. THERE IS A COMPELLING NEED FOR UNIFORMITY THROUGH A FEDERAL PRODUCT LIABILITY LAW

Product liability rules have evolved primarily from state court decisions. As a result, the rules governing a seller's product responsibility are anything but uniform. Even for a particular state, there is no assurance to a seller that the rules will not change suddenly as subsequent court decisions revise the fluid concepts of the common law.

The system we now have is fraught with uncertainty. For example, consider the uncertainty which a wholesaler-distributor faces when confronted with an allegation that he sold a defective product which caused injury to a claimant:

1. Under California law a claimant need not prove the product is unreasonably dangerous but in other states this must be established.
2. In most states the wholesaler-distributor is subject to strict tort liability even though he merely sold the product and did not participate in its design or manufacturer. In other states, the wholesaler-distributor is not strictly liable (e.g. Arizona, Arkansas, Georgia, Colorado, South Dakota, Nebraska, Kentucky) while in others strict liability has limited application to non-manufacturers (e.g., Idaho, Illinois, Kansas, Minnesota, North Carolina, Tennessee, Washington).
3. In a few states, the claim may be barred by a statute or repose if the product has been in use for ten years or more, while in other states there is no such limitation period based on the product's age.
4. In thirty-seven states the wholesaler-distributor may encounter the comparative responsibility doctrine (eleven states follow a "pure" form while the remaining twenty-six follow a "modified" form), where the other states have not adopted the comparative responsibility concept.
5. The defenses of product misuse or alteration where such misuse or alteration caused the injury complained of have either been restricted or eliminated where the conduct can be characterized as "forseeable."

This is simply a partial list of the diverse and conflicting patchwork of product liability rules as a result of the state-by-state approach. However, this is merely the beginning of the wholesaler-distributor's dilemma.

Product liability burdens interstate commerce

Depending on the commodity line involved, a wholesaler-distributor may sell products to customers in several states or to customers in all fifty states and foreign countries as well. In many cases the customer resells the product for use in other states and some products are "mobile" and may be used in any number of states. Other products are component parts to other products and are incorporated and shipped all over the country.

It can readily be seen that the typical wholesaler-distributor is not able to predict exactly in what state the products he sells will eventually be put to use. This makes it virtually impossible to determine which set of state product liability laws the product may eventually be judged against, adding to the uncertainty in the state-by-state approach.

The decidedly interstate nature of the product liability problem is nowhere more apparent when one considers the modern "choice of laws" rule and the opportunity it creates for a party to "forum shop." Consider this example: a product made in California; sold to a Wisconsin wholesaler-distributor; sold to an Illinois retailer; sold to an Illinois resident who is injured by the product while in Michigan.

Traditionally a court would generally apply the substantive law of the state where the injury occurred, no matter where the suit was brought. In our example, Michigan law would apply.

Today the modern "significant contacts" test rejects this predictability, and instead applies the law of the state having a "significant relationship with the occurrence and the parties." Using this approach in our example, it is possible that the law of California, or Wisconsin, or Illinois, or Michigan could apply. This latitude to argue results in forum shopping to seek the most favorable set of state laws and adds to transaction costs and burden on the litigation system. A Federal law will provide uniformity and would eliminate this burden and give certainty as to the rules which will decide any product liability claim.

Uniformity in product liability law possible only with congressional action

The issue in our view is not whether product liability laws should be reformed, but whether it is preferable to accomplish same at the State or Federal level. We recognize that tort law is an area historically reserved to the states and are sensitive to the fact that a compelling case needs to be made if Federal pre-emption is to be warranted. We believe that such a case exists.

A state-by-state approach to product responsibility has placed an unnecessary burden on interstate commerce. Attempts to remedy the dilemma through legislative action to reform the various state laws on product liability has fallen short of solving the problem—such laws where they have been enacted have not been uniform. This uncertainty persists even though twenty-eight states have passed product liability legislation in an attempt to alleviate the problem.

Given the interstate scope of product liability, the broad variations in state law, and the tremendous uncertainty as to which law will be applied in a particular case, it is not surprising that product liability risk evaluation by insurance underwriters is difficult. After all, product liability insurance rates are set on a countrywide basis.

NAW fully supports the conclusion in the House Subcommittee Report that the seriously needed uniformity and stability in product liability law can only occur as a result of Federal legislation. Experience indicates to us that simultaneous adoption of any uniform state product liability law by the state legislatures, or any interstate compact, is an extremely remote possibility.

3. ESSENTIAL PROVISION FOR FEDERAL PRODUCT LIABILITY LEGISLATION

Section A which follows discusses the need for a separate standard of responsibility for non-manufacturers—including wholesaler-distributors—which is based on a duty to exercise reasonable care with respect to the product. The need for and desirability of such a distinction is receiving broad acceptance today by the U.S. Department of Commerce, state legislatures, manufacturer groups, and insurer groups. This is a long-overdue return to the negligence standard for wholesaler-distributors who do not create (and should not be responsible for) defects in a product, but merely act as a conduit in distributing a product.

A non-manufacturers provision is the cornerstone of product liability reform legislation for wholesaler-distributors. No other provision, or provisions, will better address the product liability problem facing our industry.

Section B discusses the other provisions which merit inclusion in Federal legislation and are needed to restore stability and fairness to the law of product liability.

A. Product responsibility of nonmanufacturers

Section 5 of the Staff Working Draft Nos. 1 and 2 does contain the single most important provision with respect to product liability law as applied to wholesaler-distributors—a section setting forth the responsibilities of product sellers other than manufacturers. Clearly, a distinction must be made in the standards of responsibility imposed on manufacturers of products, and the standards for wholesaler-distributors and other non-manufacturers who neither design nor construct the product.

For the reasons set forth below, a Federal product liability law must contain a seller's provisions i.e., rules which define a non-manufacturer's product liability in terms of fault, and not strict liability. To not include a seller's provision would be to ignore the principal cause of the product liability problem now facing the nation's wholesaler-distributors.

Under present law, a non-negligent wholesaler, distributor or retailer can be made a defendant in a product liability lawsuit merely because he is a legal seller of the product, and even though he passes a product on to the user in its original manufactured condition. This involvement in litigation is inequitable and unwarranted; it is the result of the indiscriminate application of the doctrine of strict liability in tort to all product sellers. It has the result of exposing nonmanufacturing sellers to substantial transaction costs of defense and resultant higher insurance premiums despite the low frequency of judgments against them.

Thus, current product liability law impacts disproportionately on wholesaler-distributors. Consider these cases:

An Illinois court ruled a wholesaler-distributor of a hammer strictly liable for an injury caused by the hammer despite the fact that the product passed unopened through the warehouse. (Illinois law: *Dunham* v. *Vaughn & Bushnell Mfg. Co.*, 247 N.E. 2d 401 (Ill. Sup. Ct.)

A wholesaler-distributor of a dynamite fuse was held strictly liable for multiple injuries at a dam site, even though the wholesaler-distributor never had possession of the fuse, having passed on the customer's order to the manufacturer who shipped directly to the customer. (California law: *Canifax* v. *Hercules Powder Co.*, 237 Cal. App. 2nd 44 (Cal. App. Ct.))

A wholesaler of a casket was held strictly liable to a pallbearer who sustained injuries due to a defective handle. (D.C. law: *Cottom* v. *McGuire Funeral Service Inc.*, CCH ¶ 6320).

A wholesaler-distributor of a sump pump was found liable for the death of a man who was electrocuted in a neighbor's water-filled basement while attempting to repair the pump. (Missouri law: *Kenner* v. *Dayton Electric Mfg. Co.*, 445 S.W. 2d 362 (Mo. Sup. Ct.))

The unique position of the wholesaler-distributor must be recognized to reduce the unnecessary, non-meritorius and costly involvement of wholesaler-distributors in product liability suits and claims. A full discussion on specific problems of wholesaler-distributors under the present state law approach is contained in the Appendix to this statement.

A non-manufacturer is an extraneous party in a strict liability case. The wholesaler-distributor and other nonmanufacturers are often entitled to indemnity from the manufacturer of the defective product for losses incurred, thus shifting the responsibility for the product where it belongs. (E.g., *Liberty Mutual Insurance Co.* v. *Williams Machine & Tool Co.*, 62 Ill. 2d 77).

This "shifting" process, however, generates substantial litigation costs. Once made a defendant, the wholesaler-distributor becomes involved in two lawsuits at his own expense: one to defend against plaintiff's claim which involves his supplier's product; the other to prosecute a third-party action against the manufacturer to obtain indemnity. The litigation is further compounded if others in the chain of distribution are named defendants.

Unnecessary transaction costs can be reduced.—The substantial costs of defense and insurance premiums create special problems for wholesaler-distributors. The Department of Commerce has noted in publishing the Uniform Product Liability Act that wholesalers, distributors and retailers are "frequently brought into a product liability suit." As a consequence, Commerce reports:

"In light of ISO data showing that for every dollar of claims paid, at least 35 cents is spent in defense costs, [Citation] the net result is that wholesalers, retailers, and distributors are subject to substantial product liability costs in terms of both premiums and defense costs. *These costs are added to the price of products and waste legal resources.*" (Emphasis added) (44 FR 62726, October 31, 1979)

Staff Draft section 5 would eliminate the need for this wasteful shifting process by limiting strict liability in tort to the person ultimately responsible for the defective product. The provision would help halt complex and wasteful multiple-defendant litigation which generates litigation costs for all defendants in the suit (costs ultimately borne by the public) with no corresponding benefit.

In effect, the present law gives the claimant a strong financial incentive to name as parties to a product liability action as many members of the distributive chain as possible. The wholesaler-distributor's insurance carrier often finds it is more economical to enter into a settlement with the claimant rather than incur the inevitable costs of defense. The seller's provision eliminates this unwarranted incentive for "shotgunning" of defendants in product liability suits.

We support Section 5 of the Staff Draft which establishes a duty limitation on product sellers who are not manufacturers. It is a fair and reasonable measure which has the broad-based support of the Commerce Department's UPLA and has been adopted in various forms by 14 state legislatures so far.

The duty is a return to the negligence concept, requiring the exercise of reasonable care in the preparation and sale of a product. If the duty is breached, liability will result. But sellers are not unfairly burdened with strict liability for the product's design, or construction, or warnings and instructions—factors over which the wholesaler-distributor has no control.

B. Other important provisions for Federal legislation

Other areas of the product liability law are important to restore greater balance to the system. Each area is not addressed in the Staff Drafts and we urge that they be retained as part of any Federal legislative action. Several of the provisions are discussed below in brief.

1. *Time limitation on liability.*—Since the typical statute of limitation for personal injury begins to run from the date of the injury, the potential product liability exposure of a seller of durable goods is practically infinite. A statute of repose sets

forth a definite period of time after which product liability terminates. A repose period is necessary to eliminate the uncertainty of a potentially-infinite tail of exposure for sellers of durable products.

It is important to assure fairness to all in the chain of distribution that this repose period have the same starting and ending time for all parties, thus precluding arbitrary, discriminatory and inequitable imposition of liability which could occur where multiple repose period would have starting and ending times.

2. *Responsibility of manufacturers.*—The product responsibility of manufacturers should be well defined and limited using a standard of reasonableness. While a manufacturing defect might continue to be judged in terms of strict liability, other areas (design, instructions, warnings, warranty) should be dealt with on a fault basis. Under the fault standard there would be no design liability unless it was proved that there was a safer alternative design which was feasible and available to the manufacturer at the time the product in question was manufactured.

3. *Responsibility of product users and others.*—Consistent with the concept of fault, product users must bear responsibility for their conduct when using a product. Product sellers should have an affirmative defense against a claim for damage caused by: use of a product with knowledge of a defect; use of a product contrary to instructions or warnings; and use of a product for a purpose other than the use for which it was designed, manufactured, recommended or warranted. Damages should not be recoverable if a party is prinicpally at fault in causing his own injury, but on the other hand a slight degree of fault on the claimant's part should not necessarily bar some proportionate recovery.

4. *Misuse and alteration.*—If product misuse or an unauthorized product alteration occurs after sale, and such conduct causes (partially or totally) an injury, the product seller should not have to answer in damages for the harm so caused. This defense should not be compromised by the motion of foreseeability which has today virtually eliminated any responsibility for a product misuse or alteration.

CONCLUSION

In sum, the burden on interstate commerce makes federal product liability legislation action both preferable and necessary in our considered opinion. We would urge this Subcommittee to act to report Federal product liability reform legislation. Thank you again for the opportunity to appear before you today.

APPENDIX

IMPACT OF PRODUCT LIABILITY LAW ON WHOLESALER-DISTRIBUTORS

The wholesaler-distributor's present product liability dilemma was accurately predicted thirteen years ago by a far-sighted jurist who noted in dissent:

"Pragmatically, it will be the wholesaler and retailer who will feel the bite of the new doctrine (of strict liability in tort). As to the non-negligent distributor, wholesaler and retailer, the new doctrine is heavy-handed to the point of injustice. * * * The new philosophy of liability without fault will mean the difference between survival and extention to many a small businessman." [1]

This prediction, unfortunately, has come true today. For wholesaler-distributors, equity requires that the law be changed. Necessity requires that Federal legislation be enacted to provide uniformity and certainty to the patchwork set of state laws under which we now labor.

Doctrine of strict liability in tort

Product liability is a branch of the tort law. It may be broadly defined as the legal responsibility of a manufacturer or seller of a product to compensate a user who has been harmed by a defective condition in the product. The doctrine of strict liability in tort is one of three legal theories which a claimant may use in asserting a product liability claim. The strict liability theory is in its infancy stage when compared to the other two traditional theories of negligence and express or implied warranty.

Strict liability is liability without fault. It is imposed on the manufacturer and all sellers of a product which is deemed defective and unreasonably dangerous to the user, where the defect is the proximate cause of injury. Strict liability arises even in cases where the seller has exprcised all possible care in the preparation and sale of the product.

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[1] *Bailey* v. *Montgomery Ward & Company,* 431 P. 2d. 108, 117–118 (Ariz. App. Ct. 1967) (Dissenting opinion).

The doctrine of strict liability was judicially-created in the California case of *Greenman* v. *Yuba Power Products, Inc.*, 59 Cal. 2d 57 (Cal. Sup. Ct. 1963). Subsequently the doctrine was codified in Section 402A of the Restatement (Second) of Torts published in 1965. Today, the courts—not legislatures—have adopted strict liability or its equivalent as the law in 47 states.[2]

Wholesaler-distributors are strict liability defendants

As a direct consequence of this new legal theory, non-negligent wholesaler-distributors are now routinely made parties to product liability claims and suits. Section 402A states that *all* sellers are strictly liable, and "seller" includes a wholesaler-distributor.[3] The court cases are in agreement.

For example, in *Dunham* v. *Vaughn & Bushnell Mfg. Co.*, 247 N.E. 2d. (Ill. Sup. Ct. 1969), the court held a wholesaler-distributor strictly liable for a defective hammer which passed through his warehouse unopened, in its original package.

In fact, the doctrine of strict liability has even been applied to wholesaler-distributors who sold a product, but never had physical possession of the merchandise which was directly shipped from the manufacturer to the customer. This was the result in *Little* v. *Maxam, Inc.*, 310 F. Supp. 875 (N.D. Ill.) where a distributor had a machine shipped directly to his customer and took no part in its design, construction or installation. In a California case, *Canifax* v. *Hercules Powder Co.*, 237 Cal. App. 2d. 44, (Cal. App. Ct. 1965), the court held a wholesaler-distributor of a dynamite fuse strictly liable even though the wholesaler-distributor never had possession of the fuse, having passed on the customer's order to the manufacturer who shipped directly to the customer. These are but a few examples of the reported product liability cases which involve wholesaler-distributors.

Application of strict liability to wholesaler-distributors must be eliminated

The sweeping application of strict liability to all members of the distributive chain is harsh for several reasons. First, the wholesaler-distributor did not create the defective condition in the product; and the condition of the product—not the conduct of the parties—is the very basis for strict tort liability. Second, the wholesaler-distributor is ill-equipped to defend a product which he neither designed nor manufactured. Finally, the wholesaler-distributor must incur substantial and unwarranted defense costs; these expenditures are unnecessary, and simply fuel increasing litigation costs in product liability cases which eventually the public must bear.

Legislation is required to eliminate this inequity and limit the application of strict tort liability to the person who designs and manufactures the product and creates the defect in the product. It is these parties who create the risk and are ultimately responsible for the condition of the product. Such legislation would not in any way affect or reduce a wholesaler-distributor's responsibility for negligent conduct, for we believe liability should attach to the person truly at fault.

U.S. Commerce Department endorses product liability relief for wholesaler-distributors

In July, 1978, the Department of Commerce was directed to develop a model uniform product liability law for use by the states to relieve the present uncertainty in product liability law. This uncertainty was identified by the Federal Interagency Task Force on Product Liability as a major case of the product liability problem. After extensive study and comment by a wide-range of product manufacturers and sellers, consumers, insurer groups and associations, the Department published its Uniform Product Liability Act ("UPLA").[4]

UPLA Section 105, entitled "Basic Standards of Responsibility for Product Sellers Other Than Manufacturers," addresses the problem of excessive product liability costs for wholesaler-distributors and other non-manufacturers. Section 105, often referred to as the "Seller's Provision," would basically eliminate strict liability in tort for non-manufacturers in the vast majority of cases. However, Section 105 would hold these sellers responsible for harm to a claimant which was proximately caused by a seller's failure to use reasonable care. Essentially this represents a return to a negligence standard of conduct for wholesaler-distributors and other non-manufacturers.

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[2] CCH, Products Liability Report, Paragraph 4016 (1979). All states except North Carolina, Virginia and Wyoming have adopted the Section 402A rule of strict liability in tort or a variation of this rule.

[3] Comment (f) to Section 402A states: "The rule stated in this Section applies to any person engaged in the business of any manufacturer of such a product *to any wholesale or retail dealer or distributor* . . . The rule does not, however, apply to the occasional seller of food or other such products who is not engaged in that activity as a part of his business." (Emphasis added.)

[4] 44 FR 62714, October 31, 1979.

In recommending this change in the law, Commerce noted that the Seller's Provision would "not compromise incentives for loss prevention" and "it also leaves the claimant with a viable defendant whenever a defective product has caused harm." (44 FR 62726)

On the positive side, however, Commerce stated the change should reduce the substantial product liability defense costs and insurance premium expense now overloading wholesaler-distributors. The costs are "excessive," according to the report, wastes legal resources, and must be added to the price of the product.

Fourteen States have enacted a "seller's provision" into law

To date, fourteen states have followed the Commerce Department's recommendation that non-manufacturers generally not be subject to strict liability. The laws in each state [5] do vary in language, but as to concept there is general agreement—a wholesaler-distributor or other non-manufacturer should not be held responsible for a defect in a product designed and made by someone else.

Senator KASTEN. Mr. Keeley, thank you very much.

Did I understand the ABA testimony to be opposed to Federal product liability legislation or to product liability legislation at either the State or the Federal level?

Mr. SEVIER. Federal level only.

Senator KASTEN. You would support, then, product liability legislation on a State by State basis?

Mr. SEVIER. We would support whatever—yes.

Senator KASTEN. So your position then differs from that of the trial lawyers and Mr. Bendorf, who spoke earlier today. He was against product liability legislation regardless of the level it was at.

Mr. SEVIER. That is correct. We believe it should be left to the States. As a matter of fact, I said in my testimony that the Model Act which was promulgated and referred to many times in 1979, we certainly did not resist that being adopted by any States that so choose it.

Senator KASTEN. Mr. McKeon, could you comment briefly on the State versus Federal question? Do you feel that it can be handled on a State by State basis?

Mr. MCKEON. We think anybody who has been in this business and has any pragmatism at all knows very well it cannot be. To argue that you can get uniform laws through the States is simply to say that is a way of avoiding the issue. You will not get that done through the States.

Senator KASTEN. Mr. Keeley, do you have any comment on the ABA testimony, and as I think Mr. Greenberg suggested, the testimony that a Federal law will still leave significant problems of interpretation?

Mr. KEELEY. Well, I think that sort of underestimates the ability of the judiciary system, the judges and juries in our country. Their ability to interpret and apply statutory law, whether it be Federal or State law, has been proven over time, I do believe.

I do not see any severe problem in incorporating a Federal product liability statute with other existing State law. It is no different, for example, for an Illinois court to apply the staff draft 2 if it was enacted by the Illinois General Assembly versus staff draft 2 if it was enacted by the U.S. Congress. It is still a statutory provision. It applies to the cases, the product liability cases, and I can see no difficulty or conflict.

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[5] The states are: Arizona, Arkansas, Colorado, Georgia, Idaho, Illinois, Kansas, Kentucky, Minnesota, Nebraska, North Carolina, South Dakota, Tennessee and Washington.

Senator **Kasten**. Mr. Sevier, I do not want to beat this too much, but it seems to me, and it is the position of many people, essentially what we have is a well-organized minority within the bar association group which is swaying the entire group. Now, you said that the council of your section on tort reform or tort law reaffirmed its position against Federal legislation?

Mr. **Sevier**. That is correct. Is it not true that a special committee appointed to reevaluate this issue deadlocked in a two to two vote on whether to endorse Federal product liability legislation?

Mr. **Sevier**. First of all, I appointed the committee, so I should know quite a bit about that. When they appeared, we had three meetings in which this was discussed. One was the fall annual meeting in New Orleans, one was at the fall planning meeting which was held at Pinehurst, N.C., in October, and one was at the midwinter meeting which was held in Florida in January.

At the time, the council voted in October unanimously to reaffirm its position, to not change its position. However, it was referred to, if there were any additional arguments that wished to be presented, that they be given to a subcommittee to study this. I appointed that subcommittee with the intention that it be as balanced as possible, figuring that there probably would be an even balance of that. In other words, exactly—I am not trying to create by that appointment a minority view or a view that would be unfair.

We certainly allowed Mr. Schwartz, who testified here on Tuesday, to appear on all three occasions to discuss this matter, or at least two of those occasions, and he aired the matter thoroughly. Yes, they came forward in that position, two of them felt one way, two of them felt the other way.

It was then submitted to the council, which is the only part by the rules of the American Bar Association, by the very bylaws of the American Bar Association, to speak for the section. And that section again, after listening to that report, which was a couple of hours long, voted unanimously to reaffirm our position.

So the only official position that has been taken by a majority, not four members of a subcommittee but by 18 members of the council, representing diverse interests—and incidentally, a slightly different makeup, because we rotate three off each year and three on, a different makeup—still came up with the same rule.

Now, when you go to the house of delegates on this, as I pointed out, it was done by a voice vote with no stated opposition. There is no indication of any opposition in the matter to the house, which represents all segments of the bar. The corporate and business section has representatives to it, every section does, and that was submitted and argued to them and the report submitted to them, and again by a voice vote.

So I submit to you, Mr. Chairman, that this has been—we have been—and the reason why we wanted to give an airing to this, because we knew that your committee and other committees and Congress generally was studying this matter, and we wanted to be as fair as possible to see if time had changed, if time had changed the situation in our opinion. It had not.

Senator **Kasten**. Well, I do not doubt that your tort and insurance practice group is very strongly opposed to this or that their opinion could basically be that of the trial lawyers that make up the majority of your little subcommittee.

Mr. **Sevier**. We do not go along with the trial lawyers, you know, one way or the other about State laws. We are not taking positions, and I do not take positions, about the substance of your law either, Senator.

Senator **Kasten**. Would it be possible for us to have a copy of that report?

Mr. **Sevier**. The report is attached. The report which was submitted to the house of delegates is attached to my statement.

Senator **Kasten**. I was referring to the report of that special group that was appointed.

Mr. **Sevier**. I do not believe there was a written report submitted.

Senator **Kasten**. I misunderstood what you said, then.

Mr. **Sevier**. All four members showed up before the council and it was discussed for over 2 hours, which is about the longest agenda item we have had in some time. It is pretty hard to get lawyers to concentrate on anything for 2 hours.

Senator **Kasten**. I would like to thank the three of you for your testimony, and also to thank all of the groups and individuals who took the time to appear at this set of hearings on the proposed Federal product liability tort reform. I look forward to meeting further with interested groups to develop a bill which will meet this goal. Further hearings will be held in the coming months.

The hearing is adjourned.

[Whereupon, at 11:56 a.m., the hearing was adjourned.]

PRODUCT LIABILITY REFORM

WEDNESDAY, JUNE 30, 1982

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE FOR CONSUMERS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 235, Russell Senate Office Building, Hon. Bob Kasten (chairman of the subcommittee) presiding.

OPENING STATEMENT BY SENATOR KASTEN

Senator KASTEN. Good morning. I am pleased to open this first day of 2 days of hearings on the Product Liability Act, S. 2631, which was introduced on June 16. This legislation would create uniform product liability law throughout the United States.

I am pleased to have as original cosponsors Senators Lugar, Inouye, Abdnor, Percy, Garn, Stafford, and Glenn.

The product liability problem reached crisis proportions in the mid-1970's and it continues today. The uncertainty and, even more importantly, the instability in product liability law has become a major problem, not only for manufacturers and product sellers, but also for consumers.

Conflicting product liability rules have made it extraordinarily difficult for consumers to know their legal rights and for manufacturers to know their obligations. This has created expensive and burdensome legal costs, which are then passed on to consumers. The uncertainty has also created instability in the insurance market, which has been subject to sharp swings in costs.

There is a growing consensus that Federal product liability legislation is needed to bring uniformity and certainty to the law and to stabilize what has become a serious burden on interstate commerce. In addressing this problem, I have developed a uniform product liability bill which I believe is fair and reasonable and which protects the interests of consumers, insurers, manufacturers, and product sellers.

Consumers should have the right to recover if injured by faulty products. Manufacturers should have clear standards of responsibility under which they can know their obligations. I believe that this legislation will achieve these ends and will also reduce the legal costs associated with product liability claims, which are ultimately borne by consumers.

The proposal has had a long and careful history, beginning with the development of the Uniform Product Liability Act by the Department of Commerce in 1975. That act was developed with substantial imput from the public. Then in the 96th Congress extensive hearings were held in the House of Representatives on the topic. Out of these hearings evolved H.R. 7921, which was a Federal uniform product liability act.

In April 1981, I asked the staff of the Consumer Subcommittee to begin with H.R. 7921 and prepare a staff draft for our consideration in the Commerce Committee. That draft was issued for public comment on October 15 of last year. We received over 2,000 pages of public comment and have made substantial revisions in the draft, taking into consideration the concerns of both consumers and product sellers.

Then in March of this year, the subcommittee held 2 days of hearings on the need to reform product liability law. These hearings further enlightened us about the subject of product liability and enhanced my belief, and I believe members of the committee's belief, that this problem can be addressed only through a Federal law.

If we are to be successful in this effort to reform product liability law, we have to work together in a concerted effort. We must be certain that this piece of legislation does not fall into the hands of any particular group, but that it reflects a true consensus of all segments of the American public.

Today and tomorrow we will continue to hear from witnesses on the need for product liability reform and we will receive testimony on the merits of the specific provisions in the legislation. We have had to make some difficult decisions in drafting S. 2631, and I think that some of those decisions will be highlighted in the testimony today. Therefore, we welcome today's testimony from representatives of the academic community, individual businesses, and a broad range of consumer and product seller organizations.

[The bill follows:]

II

97th CONGRESS
2d Session

S. 2631

To regulate interstate commerce by providing for a uniform product liability law, and for other purposes.

IN THE SENATE OF THE UNITED STATES

June 16 (legislative day, June 8), 1982

Mr. Kasten (for himself, Mr. Lugar, Mr. Inouye, Mr. Abdnor, Mr. Percy, Mr. Garn, Mr. Stafford, and Mr. Glenn) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

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A BILL

To regulate interstate commerce by providing for a uniform product liability law, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

Section 1. This Act may be cited as the "Product Liability Act".

DEFINITIONS

Sec. 2. As used in this Act—

(1) "claimant" means any person who brings a product liability action, and if such an action is brought

through or on behalf of an estate, the term includes the claimant's decedent, or if such an action is brought through or on behalf of a minor, the term includes the claimant's parent or guardian;

(2) "clear and convincing evidence" is that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established; the level of proof required to satisfy this standard is more than that required under preponderance of the evidence, but less than that required for proof beyond a reasonable doubt;

(3) "commerce" means trade, traffic, commerce, or transportation (A) between a place in a State and any place outside of that State; or (B) which affects trade, commerce, or transportation described in clause (A);

(4) "express warranty" means any affirmation of fact, promise, or description relating to a product;

(5) "harm" means (A) physical damage to property other than the product itself; (B) personal physical injury, illness, or death of the claimant; or (C) mental anguish or emotional harm of the claimant caused by the claimant's personal physical injury, illness or death; "harm" does not include commercial loss;

(6) "manufacturer" means (A) any person who is engaged in a business to produce, make, or construct any product (or component part of a product), including a product seller, distributor, or retailer of products with respect to any product to the extent that such a product seller, distributor, or retailer produces, makes, or constructs the product before that product seller, distributor, or retailer sells the product; or (B) any product seller not described in clause (A) which holds itself out as a manufacturer to the user of the product;

(7) "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity (including any governmental entity);

(8) "practical technological feasibility" means the technical and scientific knowledge relating to the safety of a product which, at the time of manufacture of a product, was developed, available and capable of use or implementation in the manufacture of a product, and economically feasible for use by a manufacturer;

(9) "preponderance of the evidence" is that measure or degree of proof which, by the weight, credit, and value of the aggregate evidence on either side, establishes that it is more probable than not that a fact occurred or did not occur;

(10) "product" means any object, substance, or raw material which is capable of delivery itself, or as an assembled whole or as a component part and is produced for introduction into trade or commerce; "product" does not include human tissue or organs;

(11) "product seller" means a person who, in the course of a business conducted for that purpose, sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains, or otherwise is involved in placing a product in the stream of commerce; but does not include—

(A) a seller of real property;

(B) a provider of professional services in any case in which the sale or use of a product is incidental to the transaction and the essence of the transaction is the furnishing of judgment, skill, or services; or

(C) any person who—

(i) acts in only a financial capacity with respect to the sale of a product; and

(ii) leases a product under a lease arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor;

(12) "product user" means any person, including the claimant's employer, who owns, operates, or has control of a product;

(13) "reasonably anticipated conduct" means the conduct which would be expected of a reasonably prudent person who is likely to use the product in the same or similar circumstances; and

(14) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States.

PREEMPTION OF OTHER LAWS

SEC. 3. (a) Any civil action brought against a manufacturer or product seller for harm caused by a product is a product liability action. This Act governs any civil action for harm caused by a product, including any action which before the effective date of this Act would have been based on: (1) strict or absolute liability in tort; (2) negligence or gross negligence; (3) breach of express or implied warranty; (4) failure to discharge a duty to warn or instruct; or (5) any other theory that is the basis for an award for damages for harm caused by a product.

(b) No person may recover for any loss or damage caused by a product except to the extent that the loss or damage constitutes harm. A civil action for loss or damage caused to a product itself or for commercial loss is not a product liability action, and shall be governed by applicable commercial or contract law.

(c) This Act supersedes any State law regarding matters governed by this Act.

(d) The district courts of the United States shall not have jurisdiction over any civil action arising under this Act, based on sections 1331 or 1337 of title 28, United States Code.

RESPONSIBILITY OF MANUFACTURERS

SEC. 4. (a) In any product liability action, a manufacturer is liable to a claimant if—

(1) the claimant establishes by a preponderance of the evidence that—

(A) the product was unreasonably dangerous in construction, as defined in section 5(a);

(B) the product was unreasonably dangerous in design, as defined in section 5(b);

(C) the product was unreasonably dangerous because the manufacturer failed to provide adequate warnings or instructions about a danger connected with the product or about the proper use of the product, as defined in section 6; or

(D) the product was unreasonably dangerous because the product did not conform to an express warranty made by the manufacturer with respect to the product, as defined in section 7;

(2) the claimant establishes by a preponderance of the evidence that the individual product unit which allegedly caused the harm complained of was manufactured by the defendant; and

(3) the claimant establishes by a preponderance of the evidence that the unreasonably dangerous aspect of the product was a proximate cause of the harm complained of by the claimant.

(b) The claimant must introduce sufficient evidence to allow a reasonable person, by a preponderance of the evidence, to make the determinations specified in subsection (a). Expert opinion is not considered sufficient evidence to support a proposition of fact unless it is supported or corroborated by sound objective evidence.

(c) If the claimant has introduced sufficient evidence to allow a reasonable person, by a preponderance of the evidence, to make all the determinations specified in subsection (a) with the exception of the determination specified in subsection (a)(2), the product liability action nevertheless may be submitted to the trier of fact for a determination of the manufacturer's liability if the claimant proves by clear and convincing evidence and if the court finds that—

(1) the claimant made every reasonable effort to establish the identity of the manufacturer of the product unit which allegedly caused the harm complained of;

(2) the claimant has brought the product liability action against every manufacturer which could have produced, made, or constructed the product unit which allegedly caused the harm complained of; and

(3) each of the manufacturers against whom the action is brought is in a better position because of superior knowledge or information than the claimant to establish which manufacturer actually produced, made, or constructed the product unit which allegedly caused the harm complained of.

(d)(1) A claimant may not establish any fact necessary to make the determinations described in subsection (a) by showing that the identical issue of fact was determined adversely to the manufacturer in another action by another claimant unless both actions were based on harm caused by the same event in which two or more persons were harmed.

(2) A manufacturer may not establish any fact necessary to make the determinations described in subsection (a) by

showing that the identical issue of fact was determined adversely to another claimant in another action against that manufacturer unless both actions were based on harm caused by the same event in which two or more persons were harmed.

PRODUCT DESIGN AND CONSTRUCTION

SEC. 5. (a) A product is unreasonably dangerous in construction if, when the product left the control of the manufacturer, it deviated in a material way—

(1) from the design specifications or performance standards of the manufacturer; or

(2) from otherwise identical units of the same product line.

(b) A product is unreasonably dangerous in design if, at the time of manufacture of the product, a reasonably prudent manufacturer in the same or similar circumstances would not have used the design that the manufacturer used. A product is not unreasonably dangerous in design unless—

(1) the manufacturer knew or, based on knowledge which had sound support in the scientific, technical, or medical community for the existence of the danger which caused the claimant's harm, should have known about the danger which allegedly caused the claimant's harm; and

(2) a means to eliminate the danger that caused the harm was within practical technological feasibility.

(c) A product is not unreasonably dangerous in design if the harm was caused by an unavoidably dangerous aspect of a product. As used in this paragraph, an "unavoidably dangerous aspect" means that aspect of a product which could not, in light of knowledge which had sound support in the scientific, technical, or medical community at the time of manufacture, have been eliminated without seriously impairing the effectiveness with which the product performs its intended function or the desirability, economic and otherwise, of the product to the person who uses or consumes it.

(d) If an alternative design is offered as evidence that a product was unreasonably dangerous in design, a product is not unreasonably dangerous in design unless the claimant establishes that, at the time of the manufacture of the product—

(1) the manufacturer knew or, based on sound support in the scientific, technical, or medical community for the existence of the alternative design, should have known about the alternative design; and

(2) the alternative design would have—

(A) utilized only science and technology for which there was sound scientific, technical, or medical support and which was within practical and technological feasibility;

(B) provided better safety with regard to the particular hazard which caused the claimant's harm and equivalent or better overall safety than the chosen design. The overall safety of the alternative design is better than the chosen design if the hazards it eliminates are greater than any new hazards it creates for any persons and for any uses; and

(C) been desirable, functionally, economically, and otherwise, to the person who uses or consumes it.

PRODUCT WARNINGS OR INSTRUCTIONS

SEC. 6. (a) A product is unreasonably dangerous because of the failure of the manufacturer to provide warnings or instructions about a danger connected with the product or about the proper use of the product if—

(1) necessary warnings or instructions were not provided, under subsection (b); or

(2) postmanufacture warnings or instructions were not provided, under subsection (c).

(b) A product is unreasonably dangerous for lack of necessary warnings or instructions if the claimant establishes by a preponderance of the evidence that at the time the product was sold—

(1) the manufacturer knew or, based on sound support in the scientific, technical, or medical community for the existence of the danger which caused the claimant's harm, should have known about the danger which allegedly caused the claimant's harm;

(2) the manufacturer failed to provide the warnings or instructions that a reasonably prudent manufacturer in the same or similar circumstances would have provided with respect to the danger which caused the harm alleged by the claimant, given the likelihood that the product would cause harm of the type alleged by the claimant and given the seriousness of that harm;

(3) the manufacturer failed to provide to the claimant or to another person in accordance with subsection (d)(1) such warnings or instructions which the claimant alleges would have been adequate; and

(4) the warnings or instructions which the claimant alleges would have been adequate, if provided, would have led a reasonably prudent product user either to decline to use the product or to use it in a manner so as to avoid harm of the type alleged by the claimant.

(c)(1) A product is unreasonably dangerous for lack of postmanufacture warnings or instructions if the claimant establishes by a preponderance of the evidence that—

(A) after the product was manufactured, the manufacturer knew or, based on sound support in the scientific, technical, or medical community for the existence of the danger which caused the claimant's harm, should have known about the danger which allegedly caused the claimant's harm; and

(B) postmanufacture warnings or instructions would have been provided by a reasonably prudent manufacturer in the same or similar circumstances, given the likelihood that the product would cause harm of the type alleged by the claimant and given the seriousness of that harm.

(2) A product is not unreasonably dangerous under this paragraph if the manufacturer made reasonable efforts to provide postmanufacture warnings or instructions to a product user or to another person, in accordance with subsection (d)(1).

(d)(1) A product is not unreasonably dangerous for lack of necessary or postmanufacture warnings or instructions if those warnings or instructions were provided to—

(A) a person, including an employer, who could reasonably have been expected to assure that action would be taken to avoid the harm or that the risk of harm would be explained to the actual product user;

(B) the using or supervising expert, where the product involved is one which may be legally used only by or under the supervision of a class of experts. For purposes of this clause, warnings or instructions are considered provided to the using or supervising expert where the manufacturer employed means reasonably calculated to make them available to the expert, and this does not require actual, personal notice to the expert; or

(C) the manufacturer's immediate buyer—

(i) where the product was sold as a component or material to be incorporated into another product and the claimant was exposed to the component or material after it was incorporated or converted into another product;

(ii) where the product was used in a workplace and there was no practical feasible means of transmitting warnings or instructions directly to the claimant; or

(iii) where the claimant was not an employee of the manufacturer's immediate buyer and there was no practical and feasible means of transmitting the warnings or instructions to the claimant.

(2) A product is not unreasonably dangerous for lack of warnings or instructions regarding—

(A) dangers that are obvious. As used in this clause, "dangers that are obvious" are those of which a reasonably prudent product user or a person identified in subsection (d)(1), if applicable, would have been aware without a warning or instruction and dangers which were a matter of common knowledge to persons in the same or similar position as the claimant;

(B) the consequences of product misuse, as defined in section 10(a)(2), or use contrary to warnings or instructions available to the user or to a person identified in subsection (d)(1), if applicable; or

(C) alterations or modifications, as defined in section 10(b)(2), of the product which do not constitute reasonably anticipated conduct on the part of the product user.

PRODUCT FAILURE TO CONFORM TO EXPRESS WARRANTY

SEC. 7. (a) A product is unreasonably dangerous because it did not conform to an express warranty if—

(1) the manufacturer made an express warranty about a material fact relating to the safe performance of the product;

(2) this express warranty proved to be untrue; and

(3) the failure of the product to conform to the warranty caused the harm.

As used in this subsection, "material fact" means any specific characteristic or quality of the product, but does not include a general opinion about, or general praise of, the product or its quality.

(b) A product may be unreasonably dangerous for failure to conform to an express warranty although the manufacturer did not engage in negligent or fraudulent conduct in making the express warranty.

RESPONSIBILITY OF PRODUCT SELLERS

SEC. 8. (a) In any product liability action, a product seller is liable to a claimant, if—

(1) the claimant establishes by a preponderance of the evidence that the individual product unit which allegedly caused the harm complained of was sold by the defendant and was a proximate cause of the harm complained of by the claimant; and

(2) the claimant establishes by a preponderance of the evidence that the product seller failed to exercise reasonable care with respect to the product.

(b) In any product liability action, a product seller is liable to a claimant if—

(1) the product seller made an express warranty, independent of any express warranty made by a manu-

facturer as to the same product, about a material fact directly relating to the safe performance of the product;

(2) this express warranty proved to be untrue; and

(3) the failure of the product to conform to the warranty caused the harm.

(c) The claimant must introduce sufficient evidence to allow a reasonable person, by a preponderance of the evidence, to make the determinations specified in subsections (a) and (b). Expert opinion is not considered sufficient evidence to support a proposition of fact unless it is supported or corroborated by sound objective evidence.

(d)(1) A claimant may not establish any fact necessary to make the determinations described in subsections (a) and (b) by showing that the identical issue of fact was determined adversely to the product seller in another action brought by another claimant, unless both actions were based on harm caused by the same event in which two or more persons were harmed.

(2) A product seller may not establish any fact necessary to make the determinations described in subsections (a) and (b) by showing that the identical issue of fact was determined adversely to another claimant in another action against that product seller unless both actions were based on harm caused by the same event in which two or more persons were harmed.

(e)(1) In determining whether a product seller is subject to liability under subsections (a) and (b), the trier of fact may consider the effect of the conduct of the seller with respect to the construction, inspection, or condition of the product, and any failure of the seller to transmit adequate warnings or instructions about the dangers and proper use of the product.

(2) A product seller is under no obligation to open a prepackaged product to inspect it, and is not liable under this section for failure to open such a product.

(f) A product seller is liable for harm to the claimant caused by a product in the same manner as the manufacturer of the product if—

(1) the manufacturer is not subject to service of process under the laws of the State in which the action is brought; or

(2) the court determines that the claimant would be unable to enforce a judgment against the manufacturer.

COMPARATIVE RESPONSIBILITY

SEC. 9. (a) Comparative responsibility of the claimant shall not bar recovery in a product liability action, but shall reduce any damages awarded to the claimant in an amount proportionate to the responsibility of the claimant. For purposes of this section, "comparative responsibility" means, with respect to a claimant, conduct of the claimant involving negligence, contributory negligence or assumption of risk.

(b) In any product liability action involving a claim of comparative responsibility, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories (or, if there is no jury, the court shall make findings) indicating (A) the amount of damages each claimant would be entitled to recover if comparative responsibility were disregarded and (B) the percentage of total responsibility for the claimant's harm to be allocated to each claimant, to each defendant, to any third-party defendant, and to any other person, including an employer or coemployee. For purposes of this paragraph, the court may determine that two or more persons are to be treated as a single person.

(c) The court shall determine the award of damages to each claimant in accordance with the findings made under subsection (b), and shall enter judgment against each party determined to be liable in proportion to the degree of responsibility.

(d) If a claimant has not been able to collect on a judgment in a product liability action, and if the claimant makes a motion within 1 year after the judgment is entered, the court shall determine whether any part of the obligation allocated to a person who is a party to the action is not collectable from such a person. Any amount of obligation which the court determines is uncollectable from that person shall be reallocated to the other persons who are parties to the action and to whom responsibility was allocated and to the claimant according to the respective percentages of their responsibility, as determined under subsection (b).

MISUSE OR ALTERATION

SEC. 10. (a)(1) If a manufacturer or product seller proves by a preponderance of the evidence that misuse of a product by any person other than the manufacturer or product seller has caused the claimant's harm, the claimant's damages shall be reduced or apportioned to the extent that the misuse was a cause of the harm. If misuse by the employer of the claimant or by any coemployee of the claimant was a cause of the harm, damages shall be reduced by (A) the amount determined under section 11(a), if that section is applicable; or (B) the percentage of responsibility apportioned to the employer or coemployee, whichever is greater. Under this subsection, the trier of fact may determine that the harm caused by the product occurred solely because of misuse of the product.

(2) For purposes of this Act, misuse shall be considered to occur when a product is used for a purpose or in a manner which is not consistent with the warnings or instructions available to the user, or which is not consistent with reasonable practice of users of the product, or when a product user

fails adequately to train its employee in the safe use of the product, or otherwise provide for the safe use of the product, and that lack of training or the failure otherwise to provide for the safe use of the product was a cause of the claimant's harm.

(b)(1) If a manufacturer or product seller proves by a preponderance of the evidence that an alteration or modification of the product by any person other than the manufacturer or product seller has caused the claimant's harm, the damages of the claimant shall be reduced or apportioned to the extent that the alteration or modification was a cause of the harm. If alteration or modification by the employer of the claimant or by any coemployee of the claimant was a cause of the harm, damages shall be reduced by (A) the amount determined under section 11(a), if that section is applicable; or (B) the percentage of responsibility apportioned to the employer or coemployee, whichever is greater. Under this subsection, the trier of fact may determine that the harm arose solely because of the product alteration or modification. Reduction or apportionment under this subsection shall not be made if—

(A) the alteration or modification was in accordance with instructions or specifications of the manufacturer or product seller;

(B) the alteration or modification was made with the express consent of the manufacturer or product seller; or

(C) the alteration or modification was reasonably anticipated conduct, and the manufacturer or product seller failed to provide adequate warnings or instructions with respect to that alteration or modification.

(2) For purposes of this Act, alteration or modification shall be considered to occur—

(A) when a person other than the manufacturer or product seller changes the design, construction, or formula of the product, or changes or removes warnings, instructions, or safety devices that accompanied or were displayed on the product; or

(B) when a product user fails to observe the routine care and maintenance necessary for a product and that failure was the cause of the claimant's harm.

(3) Ordinary wear and tear of a product shall not be considered to be alteration or modification of a product under this subsection.

EFFECT OF WORKER COMPENSATION BENEFITS

SEC. 11. (a) In any product liability action in which damages are sought for harm for which the person injured is entitled to compensation under any State or Federal worker compensation law, the damages shall be reduced by the sum of (1) the amount paid as worker compensation benefits for that harm; and (2) the present value of all worker compensation benefits to which the employee is or would be entitled for the harm. If a person eligible to file a claim for worker compensation benefits has not filed such a claim, the trier of fact shall determine at the time of trial the amount of worker compensation benefits to which the claimant would be entitled in the future or the amount to which the claimant would have been entitled if the claimant had filed a worker compensation claim.

(b) Unless the manufacturer or product seller has expressly agreed to indemnify or hold an employer harmless for harm to an employee caused by a product—

(1) the employer shall have no right of subrogation, contribution, implied indemnity or lien against the manufacturer or product seller if the harm is one for which a product liability action may be brought under this Act; and

(2) the worker compensation insurance carrier of the employer shall have no right of subrogation against the manufacturer or product seller.

(c) In any product liability action in which damages are sought for harm for which the person injured is entitled to compensation under any State or Federal worker compensation law, no third party tortfeasor may maintain any action for implied indemnity or contribution against the employer or any coemployee of the person who was injured.

(d) No person entitled to file a claim for benefits pursuant to applicable State or Federal worker compensation laws or who would have been entitled to file such a claim, or any other person whose claim would be derivative from such a claim, shall be allowed to recover in a product liability action against a present or former employer or worker compensation insurer of the employer or any coemployee for harm caused by a product.

TIME LIMITATION ON LIABILITY

SEC. 12. (a)(1) If any product is a capital good, no claim alleging unsafe design as provided in section 5(b), or failure to give adequate warnings or instructions as provided in section 6(a), may be brought for harm caused by such a product more than 25 years from the date of delivery of the product to its first purchaser or lessee who was not engaged in the business of selling or leasing the product or using the product as a component in the manufacture of another product.

(2) As used in this subsection, "capital good" means any product, other than a motor vehicle, or any component of any such product, if it is also of a character subject to allowance for depreciation under the Internal Revenue Code of 1954, as amended, and was—

(A) used in a trade or business;

(B) held for the production of income; or

(C) sold, leased, or donated to a governmental or private entity for the production of goods, for training, for demonstration, or other similar purposes.

(b) Subsection (a) is not applicable if—

(1) the manufacturer or product seller intentionally misrepresented facts about the product or fraudulently concealed information about the product, and that conduct was a substantial cause of the claimant's harm;

(2) the harm of the claimant was caused by the cumulative effect of prolonged exposure to a defective product; or

(3) the harm, caused within the period referred to in subsection (a), did not manifest itself until after the expiration of that period.

(c) Nothing in subsection (a) shall affect the right of any person who is subject to liability for harm under this Act to seek and obtain contribution or indemnity from any other person who is responsible for that harm.

(d) No claim under this Act may be brought more than 2 years from the time the claimant discovered, or in the exercise of due diligence should have discovered, the harm.

ALTERNATIVE SECTION FOR TIME LIMITATION ON LIABILITY

SEC. 12. (a)(1) In any product liability action, there is a presumption that the harm of a claimant was not caused because the product involved was unreasonably dangerous because of its design, or unreasonably dangerous because of the failure to provide adequate warning or instructions, if the harm was caused after the end of the longer of the following periods:

(A) The 10-year period beginning at the time of delivery of the product to its first purchaser or lessee who was not engaged in the business of either selling such product or using the product as a component part of another product.

(B) The period (if any) during which the product seller warrants that the product can be safely utilized.

(2) The presumption under this subsection may be rebutted only by clear and convincing evidence.

(b) The presumption under subsection (a) does not apply if—

(1) the manufacturer or product seller intentionally misrepresented facts about the product or fraudulently concealed information about the product, and that conduct was a substantial cause of the claimant's harm;

(2) the harm of the claimant was caused by the cumulative effect of prolonged exposure to an unreasonably dangerous product; or

(3) the harm, caused within the period referred to in subsection (a), did not manifest itself until after the expiration of that period.

(c) No claim under this Act may be brought more than 2 years from the time the claimant discovered, or in the exercise of due diligence should have discovered, the harm.

PUNITIVE DAMAGES

SEC. 13. (a)(1) Punitive damages may be awarded to any claimant who establishes by clear and convincing evidence that the harm suffered was the result of the reckless disregard of the manufacturer or product seller for the safety of product users, consumers, or persons who might be harmed by the product. Punitive damages may not be awarded in the absence of a compensatory award.

(2) As used in this subsection, "reckless disregard" means conduct manifesting a conscious, flagrant indifference to the safety of those persons who might be harmed by a product and constituting an extreme departure from accepted practice. A negligent choice among alternative product designs or warnings, when made in the ordinary course of business, does not by itself constitute "reckless disregard".

(b) The trier of fact, in determining under subsection (a) whether punitive damages should be awarded, shall consider—

(1) the manufacturer's or product seller's awareness of the likelihood that serious harm would arise from the sale or manufacture of a product;

(2) the conduct of the manufacturer or product seller upon discovery that the product caused harm or was related to harm caused to users or others, including whether upon confirmation of the problem the manufacturer or product seller took appropriate steps to reduce the risk of harm;

(3) the duration of the conduct and any concealment of it by the manufacturer or product seller; and

(4) whether the harm suffered by the claimant was partly the result of the claimant's own negligent conduct.

(c) If the trier of fact determines under subsection (a) that punitive damages should be awarded to a claimant, the court shall determine the amount of those damages. In making that determination, the court shall consider—

(1) all relevant evidence relating to the factors set forth in subsection (b);

(2) the profitability of the conduct to the manufacturer or product seller; and

(3) the total effect of other punishment imposed upon the manufacturer or product seller as a result of the misconduct, including punitive damage awards to persons similarly situated to the claimant and the severity of other penalties to which the manufacturer or product seller has been or may be subjected.

(d) Notwithstanding the provisions of section 14, a manufacturer or product seller may introduce relevant evidence of post-manufacturing improvements in defense of punitive damages.

SUBSEQUENT REMEDIAL MEASURES

SEC. 14. (a) Evidence of measures taken after an event, which if taken previously would have made the event less likely to occur, is not admissible to prove liability under this Act in connection with the event.

(b) This section does not require the exclusion of evidence of subsequent measures in a design defect case if offered to impeach a witness for the manufacturer or product seller who has expressly denied the feasibility of such a measure.

SEPARABILITY CLAUSE

SEC. 15. If any provision of this Act or the application of it to any person or circumstance is held invalid, the remainder of this Act and the application of the provision to any other person or circumstance shall not be affected by that invalidation.

EFFECTIVE DATE

SEC. 16. (a) This Act shall be effective 60 days after the date of its enactment, and shall apply to all product liability actions commenced on or after that date, including any action in which the harm or the conduct which caused the harm occurred before the effective date.

(b) If any provision of this Act would (1) shorten the period within which a claimant may bring a product liability action, or (2) shorten the period during which a manufacturer is exposed to liability under this Act, the claimant may, notwithstanding the otherwise applicable time period, bring any such action within 1 year after the effective date of this Act.

Senator **Kasten**. For the benefit of everyone who is appearing here today, I want to review quickly the procedures. Most of the witnesses will be arranged in panels. Each member of a panel will have an opportunity to make a 5-minute oral presentation. The hearing clerk will indicate when the 5 minutes have expired.

We are pleased to welcome the witnesses who are testifying here today and tomorrow, and look forward to their statements. Our first panel consists of Mr. Schwartz, Mr. Bendorf, Mr. Connor, and Mr. Angoff.

Our first witness is Mr. Victor Schwartz, counsel to the Product Liability Alliance and an attorney here in Washington, D.C. Mr. Victor Schwartz.

STATEMENTS OF VICTOR E. SCHWARTZ, COUNSEL TO THE PRODUCT LIABILITY ALLIANCE; C. THOMAS BENDORF, ASSOCIATION OF TRIAL LAWYERS OF AMERICA; MARTIN F. CONNOR, NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION, AND WASHINGTON CORPORATE COUNSEL, GENERAL ELECTRIC CO.; AND JAY ANGOFF, STAFF ATTORNEY, CONGRESS WATCH

Mr. **Schwartz**. Mr. Chairman, I am pleased to be invited to discuss S. 2361 and its impact on current product liability law. I was invited to speak on behalf of the Product Liability Alliance, which is an organization of over 200 members, including small, medium, and large businesses, wholesaler-distributors, manufacturers, retailers, insurance agents, insurers, and brokers.

As you can appreciate, members of such a diverse group have individual views about the details of the bill. There is, however, a consensus among TPLA members in a number of areas. This morning I will briefly identify those areas of consensus and leave for others the discussion of the details of the proposal.

I begin by thanking you and Senators Abdnor, Garn, Glenn, Inouye, Lugar, Percy, and Stafford for introducing S. 2631. It comes at a time when product liability problems are being exacerbated by inconsistent State legislation and totally unpredictable case law decisions, some of which have arisen since your last hearings in March.

Let me discuss briefly some specifics in the bill. There is a consensus among all of our members that there is a need to preempt State laws in the area of product liability with a uniform law. S. 2631 follows the precept that the least Federal intervention is the most effective. We welcome the fact that no Federal office is being created and no Federal expenditure is being required.

Second, we agree that it is inappropriate to expand the jurisdiction of the Federal courts beyond their present jurisdiction. We should note that this law will help Federal courts, which currently in many situations have little or no guidance about the rules to be applied. When a Federal court addresses a product liability issue, often the State has made no decision on this issue, so the Federal courts must in effect create Federal law with no guidance whatsoever. This bill will provide some.

Third, we value the fact that you have chosen to discuss key and important issues in product liability law rather than to provide an unwieldy, detailed code. All of the issues addressed are crucial and essential to an effective, uniform product liability law. Issues not discussed in the bill will be left to State law.

Our members agree with the overall thrust of sections 5 and 6 of this bill. It is fair to impose strict liability on manufacturers for construction defects and for breaches of express warranty or promises that they extend to people who buy products.

Construction defects are easily understood by jurors. They can compare an allegedly defective product with a good one and make a rational decision about whether a product was, in fact, defective. Moreover, construction defect risk exposure can be predicted so that insurers can set rates and premiums on an actuarially sound basis. In fact, construction defects were the foundation point for strict liability under 402(a) of the Restatement of Torts.

Because some State laws do not clearly impose strict liability on product manufacturers for construction defects, this law will be helpful to those who bring causes of action in product liability. By clarifying the law, the provision will reduce transaction costs. Finally, the provision is consistent with the true foundations of strict product liability law.

Strict product liability is also appropriate where somebody has made a specific promise about his product. If a person has relied on that promise about safety and it is false and it leads to an injury, the person should recover regardless of whether the manufacturer was at fault.

There is agreement among the TPLA membership that section 5(b), which places fault as the liability base for designing a product or warning a product, is fair and equitable. If a design of a product were measured under strict liability, as it is in a few States, a totally open-ended liability system would be created. There are simply no guidelines; in most situations if you spend enough money you can design a product more carefully.

The same is true with warnings. After you know that something has happened, you can always warn about it. There is no rational limit on liability.

There is agreement within TPLA that nonmanufacturer product sellers should be liable only when they themselves are at fault. The provision does protect consumer rights by imposing liability on product sellers when their responsible manufacturers are out of business or not reachable by the judicial process. While this is inconsistent with the overall fault liability base thrust of the bill, one can understand why some consumer groups have argued that such an exception should be included.

There is general agreement that comparative responsibility principles are appropriately set forth in the bill. A person or a defendant should be liable for his own fault, not the fault of others.

TPLA members appreciate the fact that the bill addresses the topic of offensive collateral estoppel. While the very title of the doctrine seems arcane and complicated, the application of collateral estoppel against either a plaintiff or a defendant who did not have the opportunity to litigate a product liability issue with a specific party can create an extremely unfair situation.

We appreciate the fact that you have addressed the situation where a plaintiff is unable to identify who made the product. There are different points of view about this issue. Hopefully, these hearings and written submissions will provide you with more information about ways and means by which it can be resolved. There is no doubt that our members are concerned about two or three State court decisions that have broadly imposed liability where there has been no showing or reason why a particular manufacturer should pay for a harm.

Section 11 of the law, dealing with the relationship between worker compensation and product liability, evolved out of 6 or 7 years of discussion. We appreciate the fact that you have noticed the history in this area.

We also value the fact that you have dealt with the issue of time limitation on liability. Some limit on time is reasonable to impose in product liability situations.

Punitive damages are also a topic that is important. They have created particular problems in the product liability area with multiple awards.

Finally, there is addressed one of the key issues in product liability, and that is what to do about the admissibility of evidence of product improvements. If these are used against people when they improve products, it discourages safety innovation.

As these hearings will reflect, some of our members were disappointed that a number of issues were eliminated from this bill and that almost all the changes that were made between staff draft 2 and S. 2631 were done on behalf of those who bring product liability actions. But we appreciate the fact that the bill was developed through a carefully balanced process. No group, as your introductory remarks show, controls it. What we want is a fair, effective and balanced bill and we value the fact that you have made that goal paramount.

Thank you.

[The statement follows:]

STATEMENT OF VICTOR E. SCHWARTZ ON BEHALF OF THE PRODUCT LIABILITY ALLIANCE

Mr. Chairman, I am very pleased to be invited to discuss S. 2631 and its impact on current product liability law. I was invited to speak as counsel for The Product Liability Alliance (TPLA), an organization of over 200 members, including small, medium, and large businesses, wholesaler-distributors, manufacturers, retailers, insurance agents, insurers and brokers. As you can appreciate, members of such a diverse group have individual views on some details addressed in S. 2631. There is, however, a consensus among TPLA members in a number of areas. I will identify those consensus areas in my testimony here this morning. Individual witnesses, who are members of TPLA, and others, will provide you with detailed considerations about the proposal,

I would begin by expressing our deepest appreciation to you and Senators Abdnor, Garn, Glenn, Inouye, Lugar, Percy and Stafford for introducing S. 2631. It comes at a time when product liability problems are being exacerbated by inconsistent state legislation and totally unpredictable case law decisions.

Let me discuss some specifics in the bill.

There is a consensus among TPLA members that there is a need to preempt state laws in the area of product liability with a uniform law. S. 2631 follows the precept that the least federal intervention is the most effective. In that regard, first, we welcome the fact that no federal office is created nor is any federal expenditure required.

Second, we agree that it is inappropriate to expand the jurisdiction of the federal courts beyond their present jurisdiction. We should note, that this law will help federal courts which currently, in many situations, have little or no guidance about the rules to be applied. Where a federal court addresses product liability issues about which state law gives little or no guidance, it must create totally new product liability law that may not and often does not have any basis in existing state law.

Third, we value the fact that you have chosen to discuss the key and important issues in product liability law rather than to provide an unwieldly, detailed code. All of the issues addressed are crucial and essential to an effective uniform product liability law. Issues not discussed in the bill will be left to State law.

Our members agree with the overall thrust of Sections 5 and 6 of this bill. It is fair to impose strict liability on manufacturers for construction defects and for breaches of express warranty or promises that they extend to people who buy products. Construction defects are easily understood by jurors. They can compare an allegedly defective product with a good one and make a rational decision about whether the product was, in fact, defective. Moreover, construction defect risk exposure can be predicted so that insurers can set rates and premiums on an actuarially sound basis. Because some state laws do not clearly impose strict liability on product manufacturers for construction defects, this law will be very helpful to consumers. By clarifying the law, this provision will reduce transaction costs. Finally, the provision is consistent with the true foundations of strict product liability law, which was originally intended to focus solely on construction defects.

Strict liability for breach of an express warranty is also fair. A person who has relied on a promise about safety which is false and which leads to an injury should recover. Under the bill, a manufacturer would be liable even if the goals of his promise were impossible to meet; where the manufacturer has used that promise to induce the sale of the product it should be responsible. Manufacturers are willing to accept responsibility.

There is general agreement among the TPLA membership that the thrust of Section 5(b), which places a fault base on one's duty to design a product, is fair and equitable. If design of a product were measured under strict liability, a totally open-ended liability system would be created. Such open-ended liability is appropriate only for a non-fault compensation system with limited damages, such as worker compensation.

The same is true with respect to Section 6 of the bill which deals with warnings or instructions. The only rational way to measure responsibility to warn or instruct is on a fault base. Section 6 does this and clearly states that a manfuacturer's obligation to warn or instruct about his product should be viewed and evaluated at the time he sold it. Decisions imposing hindsight and 1982 knowledge on older products are simply not fair. They create a totally open-ended liability which is inappropriate in tort law.

There is agreement within TPLA that non-manufacturer product sellers should be liable only where they themselves are at fault. This is the thrust of Section 8 of the bill. That provision will go a long way toward reducing transaction costs in product liability cases involving retailers, wholesalers-distributors, and other persons in the distribution chain. We note that the provision protects consumer rights by imposing liability on product sellers when the responsible manufacturer is out of business or not reachable by judicial process. While some of our members find this quite inconsistent with the thrust of the bill, which focuses on fault, one can understand why some consumer groups have argued that such an exception should be included.

There is general agreement that comparative responsibility principles are appropriately set forth in the bill. A person should be liable for his own fault and not the fault of others. Comparative responsibility also places incentives for risk prevention on the party or parties who create and can prevent a harm. A detailed example of this is reflected in Section 10 of the bill, which deals with misuse or alteration of products. Cases imposing total liability on a product seller whose product has been misused or altered have created some of the most unfair judgments in product liability. We have supplied and will supply to the Committee examples of this kind. The bill would reduce a judgment against a product seller to the extent that misuse or alteration caused or contributed to the harm.

TPLA members appreciate the fact that the bill addresses the topic of offensive collateral estoppel. While the doctrine may seem complicated and somewhat arcane, the application of collateral estoppel against either a plaintiff or a defendant, who did not have an opportunity to litigate a product liability issue with a specific party, can create an extremely unfair situation. It can result in a person being held liable where he has not had an opportunity to truly litigate and be heard on the specific facts of the case.

We appreciate the fact that you have attempted to address those situations where a plaintiff alleges that he is unable to identify who made a particular product. There are different points of view about this issue. Hopefully, these hearings and written submissions will provide you with more information about ways and means by which it can be resolved. There is no doubt that our members are concerned about the two or three state court decisions that have broadly imposed liability where there has been no showing or clear reason to why a particular manufacturer should pay for a harm.

Section 11 of the bill dealing with the relationship between worker compensation and product liability evolved out of six or seven years of discussions among various affected parties. I will not comment in detail on it, except to note that we value the fact that the provision appreciates the history of the discussions and many agreements and compromises that have been made over time.

You will hear a great deal about and will have a separate panel on the issue of time limitation on liability. Our members believe that at some point a product manufacturer should no longer be responsible for harms caused by a product. We are not blind to the fact that there is sharp controversy about this subject, but do believe that responsibility must come to an end at some point in time. As I indicated, you will hear a good deal from all parties on the specific panel on that subject.

Our members are appreciative of the fact that the topic of punitive damages has been addressed in your bill. Punitive damages have caused some serious problems in product liability cases. For example, they may be awarded even where no true reckless conduct by the manufacturer has been shown and where an individual defendant has been subjected to repeated impositions of punitive damages. Courts have struggled unsuccessfully to deal with these issues. It would appear that they can only be successfully resolved through a legislative effort.

There is clear consensus that the topic set forth in Section 14—subsequent remedial measures—must be addressed. If a product seller risks additional product liability exposure for older products just because he improves or enhances newer products, we have engaged in public policy that is simply wrong. Product sellers should be given every incentive to improve products without the fear that such improvements will be used against them in claims involving older products. While the overwhelming majority of states are in accord with this view, the fact that less than a handful are not, can, in our interstate system, totally eviscerate the sound public policy of the overwhelming majority of states. It is a good example of why federal legislation is essential in this area.

As these hearings will reflect, some of our members were disappointed with the fact that certain important topics, such as compliance with government standards, are not considered in S. 2631, although they were treated in earlier staff drafts. Our members have also observed that most of the substantive changes made in the bill since Staff Draft No. 2 have sharply reflected the interests of those who bring product liability actions. On the other hand, all TPLA members appreciate that no one group controls this process.

My role has simply been to provide an overview and a clear indication that our members are seeking a fair, effective and balanced bill. They want to avoid parochialism.

We all appreciate how difficult your role and that of the other Senators is in this matter. Nevertheless, we firmly believe that the end result will reduce product liability costs for all concerned and produce fair results in the cases. We think that this will be a major accomplishment that can only be handled effectively by the Congress of the United States.

Thank you.

Senator **Kasten**. Thank you, Mr. Schwartz.

Mr. Thomas Bendorf.

Mr. **Bendorf**. Thank you, Mr. Chairman.

My name is Tom Bendorf. I am an attorney from Columbia, S.C. I represent the Association of Trial Lawyers of America. I appreciate the opportunity to be here, Mr. Chairman. I look forward to similar opportunities over the next few years. And I am really here to address myself to the lack of need and the inappropriateness of this legislation.

We, the association, have great faith in the vitality of common law. We have great faith in the principles of home rule and the principles of federalism that have left traditionally the law of torts to the State legislatures and to the judges in the various courts of the States. We do not recognize the problem that produces paid claims of something in the neighborhood of $400 million a year in a gross national product of $2.3 trillion-plus, a cost of less than $2 for every man, woman, and child in the United States to be protected from and made safe from defective products.

We hear a great deal about the diversity of law. All tort law is diverse. The obvious logical extension of an effort to produce Federal law for the convenience of the producers of defective products is to produce Federal law for everyone in the field of tort. We do not think it is appropriate.

I hear, for example, mentioned the subject of punitives. I do not know where these punitives are. The Closed Claim study in 1977 found one case in an analysis in excess of 20,000 cases which they presumed were about a third or a fourth of all of the product cases in the Nation; they found one punitive case, and later apologized and pulled that one out.

We hear a lot about the increase in verdicts. We do not hear much about the increase in claims. I read just the other day of a verdict. Jury Verdict Research does research on jury verdicts, not on settlements and not on the payments of claims. There was a dental malpractice case the other day, $750,000 verdict, an extremely high verdict, which case was settled for less than $50,000. But in Jury Verdict Research it still remains at $750,000.

The Pinto case with which we are all familiar produced $125 million in punitives in a verdict. It was cut by the judge from $125 million to $3 million, and both sides appealed.

Should there be punitives? I am aware of a case settled in Chicago several years back where a product was determined by the manufacturer to be defective. He redesigned the product, he eliminated the defect, he eliminated the threat of harm. And then he held the new product off the market so that he could sell the old defective product through the Christmas season. That kind of decision calls for punitive action.

The people of the United States have developed an attitude, have developed an expectation, if you wish, that they should be secure in their persons from the tortious conduct or the misconduct of others. That is not a sense of entitlement. It has nothing to do with deep pockets. It is a simple expression that people expect to be secure in their person, that they do not expect to have to pay when somebody else snatches away a right or snatches away some part of the enjoyment of life.

The legislative attitudes in the Nation apparently reflect the attitudes of the majority of the people. That is what this system of government is all about.

The changes in attitude are a little surprising, considering that they are coming from those from whom they are coming, because they have not been noted for a mad dash for strong Federal action in the past. It is going to be very interesting to watch their conduct in the future.

I will be happy to answer your questions if I can. Thank you very much.

[The statement follows:]

STATEMENT OF C. THOMAS BENDORF, ASSOCIATION OF TRIAL LAWYERS OF AMERICA

Mr. Chairman and members of the Consumer Subcommittee of the Senate Committee on Commerce, Science and Transportation. I am pleased to be here today to testify on behalf of the Association of Trial Lawyers of America. My name is C. Thomas Bendorf and I am an attorney from Columbia, South Carolina. ATLA is a national law association representing over 40,000 members of the trial bar in 50 states. For the most part, our members represent the interests of injured consumers and users of products, rather than the defense of the manufacturer and seller of those products. I appreciate this opportunity to present the views of ATLA to the Subcommittee on the subject of the need for uniform product liability law in the United States.

It becomes ever more difficult to discuss and describe one of the great non-problems of our generation. What one describes as the greatest threat to civilization another perceives as a mere mote in the eye of the beholder. The crazy quilt pattern of diverse laws so offensive to some is merely the manifestation of the health and vitality of the common law to another.

An attempt to stand in the way of this magnificantly orchestrated, well-oiled steamroller would seem to many the height of incaution. The step urged by the manufacturers of defective products to immunize themselves from the consequences of the horror they have caused others requires of the Congress a high price indeed.

Will the manufacturers now be heard to support Federal Workers' Compensation legislation? Have they at last concluded that the problems of this nation can be best addressed by a strong central government? We can now expect, I suppose, support for more federal involvement in rules and standards for all of the rest of their business conduct. Will these include wage and price controls, federal regulation of the insurance that underlies the new product liability scheme, passive restraint, bumper standards, etc., or is the desire for this "federal consistency" to be limited to those areas in which they limit their own responsibility to their victims?

How big is the problem they seek to solve with this singular departure from their traditional principles? In 1979 the gross national product was about 2.3 trillion dollars. In 1979 the total losses paid for product liability could not have totaled 400 million dollars or roughly 18 thousandths of one percent of the GNP (or less than $2.00 for each man, woman or child in America, 2 hundredths of one percent of the per capita income in 1979). This does not seem too high a price to pay for the maintenance of the simple proposition that every citizen must be secure in his person against the tortious misconduct of others.

While we are on a statistical bent we really believe the Committee should have the truth instead of the fallacy initiated in the report of the President's Interagency Task Force and perpetuated by the rhetoricians who brought us a million Product Liability claims and lawnmower stories. Their tale reports 77 cents paid to attorneys for each 66 cents paid to victims. I have provided figures from insurance company filings which demonstrate that for each 66 cents to victims, all lawyers, insurance company and those whom the victims have to employ to receive their 66 cents, could cost no more than 45 cents. Inaccuracies of over 70 percent could have been tolerated prior to the National Association of Insurance Commissioners (NAIC) Product Liability Supplement but they are inexcusable now. This information has been available since 1 May 1980 so repetition of the error must now reflect unfavorably on the integrity of those who repeat the error.

This seems an appropriate time to show some of the insurance facts available to the Committee should it ever seek to find the real problem facing the manufacturers.

The term loss expense includes all payments for legal expenses, including attorney's and witness fees and court costs, salaries and expenses of investigators, adjusters and field men, rents, stationary, telegraph and telephone charges, postage, salaries and expenses of office employees, home office expenses and all other payments under or on account of such injuries whether the payments are allocated to specific claims or are unallocated.

Pay to Claimant ($851,860,417) minus Claimant's Attorney ($230,002,312) equals Net to Claimant ($621,858,105).

Defense Attorney ($209,252,000) plus Plaintiff's Attorney ($230,002,312) equals Total Attorney ($439,257,312).

Therefore, 66¢ for plaintiffs=45¢ for lawyers=$3.56 in premiums.

Year	Direct earned PR.	Losses paid	Percent LP/EP	Loss adj. expense	Percent LAE/EP
1979	$1,221,917,957	$231,251,653	0.18925	$110,373,510	0.09032
1980	1,154,262,488	293,200,033	.25401	136,460,395	.11822
1981	980,642,296	327,408,731	.33387	171,670,095	.17505
Total	3,356,822,641	851,860,417	.25376	418,504,000	.12467

I have provided product liability information for 1979, 1980 and rather fragmentary information for 1981. The claims paid ratio for the three years combined is around 25 percent. That is for each premium dollar twenty five cents are paid in claims. While the NAIC has required the reporting of these figures they have so far refused to provide them to us so we must scan the filings of a number of states to get a representative sample. (Exhibit A.)[1]

To show how this compares to casualty insurance generally I have included from 1980 Annual Statements the premium income and claims paid for all lines of insurance for all years for the top twenty companies (in premium income) listed in Best's "Reproduction of Convention Statements/Property-Casualty," 1981 Edition. (Exhibit B.) All casualty companies show a relatively constant claims paid ratio of around 50 percent. I have also provided a graph which simply shows dollar amounts of a substantial portion of the premium dollars, losses paid and loss adjustment expenses for 1979, 1980 and 1981. (Exhibit C.) Additionally, I have enclosed exhibits showing loss adjustment expense and commissions paid for the same companies. (Exhibit D.)

I thought it appropriate to include an estimate of investment income for the last 6 years for the line "General Liability." (Exhibit E.) This is the report which includes product liability. It is produced from the figures reported by the insurance companies and assembled by A.M. Best in the report on Loss Reserve Development. The figures presume a 10 percent return on investment and a constant cash flow (½ annual per 6 months). It is interesting to note that the investment income on loss reserves must necessarily exceed the amount received by attorneys for both defense and plaintiffs by a wide margin. Unfortunately, such information is not yet available to product liability alone.

Finally, for the benefit of those who negotiate product liability policies, here is a specially selected list of companies, their 1979 and 1980 experience as to premiums, claims paid, etc. It should be of interest to those who pay premiums. One conclusion which could be drawn from these figures is that they have excellent defense counsel, another is that their rates should not rise (at least not too much). I will allow others to draw other conclusions.

Company	Direct earned PR.	Losses paid	Percent LP/EP	Losses incurred	Percent LI/EP	Percent LP/LI
INA	68,195,830	2,395,681	0.0351294353	36,369,435	0.5333087815	0.0658707236
Employers of Wausau	65,245,652	1,623,962	.0248899651	39,700,469	.6084768530	.0409053606
St. Paul	46,958,633	2,949,184	.0628038725	28,504,545	.6070139435	.1034636406
U.S. Fire	43,704,719	4,037,441	.0923799785	20,512,383	.4693402330	.1968294469
Transamerica	36,640,630	4,198,607	.1145888321	6,942,556	.1894769822	.6047638651
Safeco	27,406,164	2,881,448	.1051386834	6,584,652	.2402614163	.4376006507
Home	23,403,151	496,284	.0212058624	24,546,181	1.048840859	.0202183794
National Fire	20,639,613	724,119	.0350839427	5,778,445	.2799686700	.1253138171
Central National of Omaha	18,005,200	15,177	.0008429232	4,059,899	.2254848044	.0037382403
State Farm	16,321,757	1,616,643	.0990483439	1,616,643	.0990483439	1

This should shed some light on the nature of the problem you seek to solve. The proposed solution is like the use of an atomic weapon in an argument with your wife.

Incidentally, we do in part agree with wholesalers, distributors and retailers that it is rare that they should all be joined as defendants in product liability suits. We will be happy to work with them in the development of state legislation which would insure their exclusion except when that exclusion would do violence to the interests of justice. We would also assist them to the extent of our ability in the passage of such legislation.

The proponents of this legislative effort would discharge the state legislatures as know-nothings whose only real sin is independence of thought and a constant manifestation of a desire to serve the entire public. The proponents would turn their back on the nature of this republic and that for which it stands. The proponents would emulate the totalitarian states of Eastern Europe of the code countries of Western Europe. The proponents would stamp out the vitality of common law, choke off its health and its capacity to grow and be nurtured by the attitudes of the public and the intellect of the judiciary. The soul of this nation finds expression in common law and must remain there instilled, however much this disconcerts the manufacturers of defective products.

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[1] The exhibits referred to in this statement have been retained in the committee files.

Truth in advertising should require the identification of the proponents as they are, The National Association for the Protection of Producers of Defective Products. They obviously get guidance from their patron saint, Marie Antoinette. The plead for equity and balance. If they were to apply their principles to Civil Rights we would have "Jim Crow" on Monday, Wednesday, and Friday. Justice is the rendering to one his due. Justice would be truly blinded by the statute of repose. The Congress should be blind to these efforts to leave innocent victims without reparation. This republic will be deemed blind if it allows the traditional, historical and essential theater of tort law to be closed, threatened or intimidated by Congressional response to the producers of defective products.

Plato said that the highest reach of injustice is to be deemed just when you are not. I think an even higher reach of injustice is to seek to work injustice while prating self righteously about justice and equity.

Senator KASTEN. Our next testimony will be from Mr. Martin F. Connor of the National Electrical Manufacturers Association. Mr. Connor.

Mr. CONNOR. Thank you, Mr. Chairman. My name is Martin Connor. I am Washington corporate counsel for General Electric Co. I am here to testify for the National Electrical Manufacturers Association.

NEMA strongly supports S. 2631 and urges its enactment by the 97th Congress. We have submitted written comments which fully discuss three points: First, the extraordinary 6-year process of public participation which produced S. 2631, to which you referred, Mr. Chairman, in your opening remarks.

Second, the need for Federal product liability legislation almost irrespective of its content;

And third, the need for the specific substantive reforms which are incorporated in S. 2631. It is this third point which I want to discuss here.

By far the most important provisions and the ones we want to deal with in the few minutes we have are those which relate to the standard of responsibility for manufacturers and product sellers, sections 4 through 8 of S. 2631. Product liability law began with the industrial revolution early in the 19th century. Until 1963 a product manufacturer's liability to users of its product was premised upon fault, upon conduct, according to the Restatement of Torts, which falls below the standard established by law for the protection of others against unreasonably great risk of harm. That standard was universally acknowledged to be the conduct which would be expected of a reasonable man of ordinary prudence.

All that changed with the decision of the Supreme Court of California in Greenman versus Yuba Power Products and the subsequent formalization of that case's rationale in the Restatement (Second) of Torts, section 402A. Greenman and 402A imposed what has come to be called strict liability on the commercial seller of a product which is deemed to be defective. No fault need be shown. Conduct is not at issue. A manufacturer is liable if a product which he manufactured is defective and the defective condition is the proximate case of the plaintiff's injury.

The key question obviously is when is a product defective. Greenman dealt with what we would call a construction defect, a product's failure to perform to its manufacturer's own specification. The authors of section 402 apparently had the same sort of thing in mind, and what they proposed, while hardly a restatement of existing law, was quite reasonable: If a product deviates from its own manufacturer's specifications and if someone is injured as a result, it is fair to set up a conclusive presumption that the manufacturer was at fault. At least it is far fairer than to demand that the injured person take on the Herculean task of proving by a preponderance of the evidence that the manufacturer was at fault.

S. 2631 incorporates this principle in its section 5(a), and then in section 7 it extends the same principle, again very reasonably, to a manufacturer's express warranties. If a product does not conform to its manufacturer's representations about it and if someone is injured by that aspect of the product, the manufacturer is to be strictly liable.

All very reasonable. But the courts have not been content to leave the matter there. They have gone on to define two quite different contexts in which a product may be defective for purposes of imposing strict liability. In 1970 the Supreme Court of California again broke new ground by holding "that a product may be equally defective and dangerous if its design subjects protected persons to unreasonable risk as if its manufacture does so."

It does not matter whether the manufacturer acted reasonably and prudently or whether the product's design was unreasonably dangerous. Needless to say, it is routine today for a product liability claim to allege that a different product design would have prevented or mitigated this particular claimant's injuries.

The court then went on to hold that a product could also be defective and the product seller strictly liable because of failure to provide proper warnings or instructions. Again, the reasonableness of the seller's conduct is not at issue.

Nowadays, every product liability case is at least potentially a failure-to-warn case. Alleging the failure to warn avoids for plaintiff the messy business of demonstrating a construction or design defect.

Having reached the point that a manufacturer or seller, regardless of the reasonableness of his or her conduct, may be strictly liable where a product is defective for failure to use the design or to provide the warning which plaintiff's experts say would have been safer, it was a short step for the Supreme Court of California to hold that a product is defective if it lacks any element necessary to make it safe, or for the Supreme Court of California to hold that a product is defective if, after the plaintiff proves that the product injured him, the defendant fails to prove that it was not defective.

What is the engine that has driven these cases and brought product liability to its present pass? In two words, Mr. Chairman, risk distribution. A very explicit economic rationale underlies the cases: As between a product seller and a product user, better that the cost of injury fall on the product seller since he is able to distribute that cost over all the purchasers of his product.

What the courts have been concerned with, in short, is compensation. The courts want to assure that there is a remedy for every harm and that it is provided by the person best able to pay. There is nothing wrong with a compensation system for injuries caused by products. New Zealand has one and we could have one.

But that is not what the tort system historically has been about. The tort system is designed on the principle that a person is responsible for the consequences of his or her wrongful acts, and if therefore one intentionally or negligently harms another person one has an obligation to repair the harm.

The courts have given us the worst of all worlds, compensation-system standards of liability, reparations-system levels of benefits and procedures for dispute resolution.

S. 2631 would restore the balance we need for establishing reparations-system standards of liability for design and warning cases.

Mr. Chairman, NEMA repeats its strong support for S. 2631 and commends the bill's sponsors, especially you, Mr. Chairman, for their leadership.

[The statement follows:]

STATEMENT OF MARTIN F. CONNOR, GENERAL ELECTRIC CO, ON BEHALF OF NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION

My name is Martin Connor. I am Washington Corporate Counsel for General Electric Company. For many years prior to my current assignment I was senior counsel for General Electric industrial products and systems businesses with responsibilities which included product liability counseling and litigation management. I am here today to testify on behalf of the National Electrical Manufacturers Association.

NEMA strongly supports S. 2631 and urges its enactment by the 97th Congress. We recognize that the bill does not reflect all of the wishes of the business community. We also recognize that there are aspects of the bill which will displease other interest groups. It may be that the bill, as it moves through the legislative process, will be amended in ways which will meet more satisfactorily the legitimate interests of manufacturers, sellers and users of products. In its present form, however, and whatever its imperfections, the bill is a very fair and sensible reform of a product liability system which is grossly unfair to manufacturers, to sellers and to consumers.

I suspect that very few bills have been introduced in the Senate of the United States after as much study, public comment and public discussion as preceded the introduction of S. 2631. The roots of this bill reach back at least as far as the White House Conference on Product Liability convened by President Ford in March 1976 and to the very comprehensive research and voluminous 1977 report of the federal Interagency Task Force on Product Liability. On the basis of that report, a Department of Commerce Task Force on Product Liability and Accident Compensation Issues published in the Federal Register for April 6, 1978, a comprehensive Options Paper for public comment. As a result of public reaction to that paper, the Department of Commerce prepared and published for comment in the Federal Register of January 12, 1979, a first draft of a Model Product Liability Act. That draft was extensively revised as a result of the comments received and was published in the Federal Register of October 31, 1979 as the Uniform Product Liability Act.

The Uniform Product Liability Act then served as the basis for a bill, H.R. 7000, introduced in the 96th Congress, on April 1, 1980, by Congressman Richardson Preyer. Hearings were held in April 1980 and on the basis of information received in those hearings a revised bill, H.R. 7981, was introduced by Mr. Preyer on August 1, 1980.

On October 15, 1981, at your direction, Mr. Chairman, the staff of the Senate Committee on Commerce, Science and Transportation prepared and circulated for public comment a Working Draft of a bill which was based substantially on H.R 7921. Thousands of pages of commentary were submitted by interested parties of every persuasion. After analysis and assessment of these comments, the Committee staff, again at your suggestion, prepared a Staff Working Draft No. 2 which was again circulated for public comment on March 1, 1982 and which was again the subject of considerable public response. Thereafter Working Drafts No. 3 and 4 were prepared and circulated privately, as I understand it, within the legislative branches in a continuing effort to achieve consensus on this important issue.

As these hearings are held today, more than six years after the White House Conference on Product Liability, this Committee has before it a bill growing out of a public record which must be almost unprecedented for its breadth and depth. In the course of its evolution competing interests have been heard and weighed. The result is an exceptionally thoughtful and balanced legislative proposal.

This is the first point NEMA would make. It may seem unnecessary to those who are familiar with the history we have reviewed, but its importance cannot be overstated. S. 2631 is the product of a long and extraordinary process of public participation and consensus-building. It deserves to be taken very, very seriously.

Out of this long public discussion two points seem to have emerged quite clearly: (1) the need for federal legislation on this subject, almost irrespective of its substantive content and (2) the need for certain specific substantive reforms of the product liability system. I will briefly address each of these points.

THE NEED FOR FEDERAL LEGISLATION

What I am about to say has been said many times and may be repeated many times again in these hearings, but it may be helpful to summarize the state of the question.

(1) *There is an urgent need for consistency and stability in the substantive law of product liability.*—Consistency and stability. People who design, manufacture and market products have a right and a need to know the standards by which society will hold them accountable for the safety of their products. They have a right and a need to know that those standards will remain in effect during the life of a product.

Today they don't know either of these things. When they look to the law of the fifty states and the District of Columbia they find fifty one standards which vary widely in their content and the degree of their clarity. Most of these standards have been established by judges, not legislators. The judges who made them retain the right to change them. It is a commonplace observation among those who must defend product-liability cases that it is only after they have won or lost that they find out finally what the law was for that case. This provides an exciting game for trial lawyers but it is a nightmare for people who are trying to plan and run a business rationally.

(2) *There is no prospect that the states will adopt a uniform, stable product liability law.*—Following publication of the Uniform Product Liability Act in 1979, there was widespread euphoria that the problems I have just described would be corrected by its enactment in the states. And, in fact, product liability reform statutes have been enacted, in one form or another, in some twenty-eight states. The further fact, however, is that no two of these statutes are alike and most of them fail to address the principal issues which arise in product liability cases. The net result is that we can already say with a degree of confidence approaching absolute certainty that the state legislatures will not give us the uniform, stable product liability law which manufacturers, sellers and users of products desperately need and deserve.

The state legislatures are not to be blamed for this failure. There is simply no reason to expect any state to solve what is in fact the problem of a national market. A majority of the products manufactured in every state are ultimately used in another state. A majority of the products used in every state were manufactured in other states. How can any state legislature fairly and effectively balance and advance the interests of the manufacturers, merchants and consumers of that one state? It can't be done.

We are sometimes told that if forty-nine states and the District of Columbia could adopt the Uniform Commercial Code, they may reasonably be expected eventually to adopt a Uniform Product Liability Act. The analogy is very misleading. As long ago as the Middle Ages there was a uniform commercial law, the *lex mercatoria* or "law merchant," which was in effect across all of Europe. The law merchant was incorporated into the English common law and thus found its way into the common law of the American colonies and states. It was codified first in 1906 in the Uniform Sales Act and then in 1951 in the Uniform Commercial Code. A thousand years of history have produced moderately consistent and stable commercial law at the state level. (The various states have actually made a thousand or so separate amendments to it!) It should be perfectly apparent, however, that this history is totally different from that of product liability law and gives us no reason to think the states will adopt a uniform product liability law. If anything, it suggests that we may be a millennium away from that happy event!

(3) *Federal product liability legislation would be completely consistent with the U.S. Constitution and with principles of federalism.*—The Commerce Clause clearly permits a federal solution. To put it even more strongly, this is precisely the sort of problem which the authors of our federal constitution intended Congress to address.

The intent and effect of S. 2631 is plainly to "regulate Commerce . . . among the several States." Product liability insurance rates are set on a nationwide basis. (This contrasts sharply with the way other rates are set, such as for medical malpractice and automobile insurance.) Product-liability awards impact not only a national insurance market but also a national market for the products themselves. Awards to injured workers and consumers affect a wide range of business decisions made by manufacturers: what prices they charge, what products they manufacture, what new products they develop, whether they enter or exit a particular business.

S. 2631 would not be an unprecedented intervention. The same interest in protecting interstate commerce which would justify enaction of a federal solution to the product-liability problem prompted Congress in the past, for example, to extend the exercise of its power to unfair and deceptive practices in the sale of goods, to fraudulent securities transactions, to the misbranding of drugs, to price discrimination and to many other aspects of commercial activity.

All in all, it could not be clearer that this is precisely the sort of subject which should be addressed not locally but federally. We agree completely with the current Administration's plans to return to state and local government, to the greatest extent possible, responsibility for programs which can be effectively administered at the state or local level. That Congress should continue to "regulate Commerce . . . among the several states," however, is not only not inconsistent with federalism (whether 1789 federalism or "New Federalism") it is the very essence of federalism.

THE NEED FOR SUBSTANTIVE REFORM

Granted that there is a need for consistent, stable product liability law and that this reform will only be accomplished at the federal level, what should that law be? Over the past five or six years a very broad consensus has arisen on this subject. It is very striking that while there are a number of controversial provisions in S. 2631, and a number of controversial omissions from it, its core provisions are widely accepted. This is a point NEMA wants particularly to emphasize. Except among those who want no change whatsoever in the status quo, there is general agreement on the essential elements of substantive reform. These include, for example, revised standards of responsibility for manufacturers and product sellers, adoption of a principle of comparative responsibility, elimination of the employer's right of subrogation and limitations on the use of evidence of subsequent remedial measures.

By far the most important provisions are those which deal with the standard of responsibility for manufacturers and product sellers, sections 4 through 8 of S. 2631. As an association of manufacturing companies, NEMA will limit its comments to the standard of responsibility for manufacturers. We are, however, Mr. Chairman, concerned with several of these other provisions and would propose, with your permission, to provide for the record a written analysis of several other sections.

(1) *Strict liability for construction defects and breaches of express warranty.*—Product liability law began with the industrial revolution early in the nineteenth century. Until 1963 it was black-letter law, as reported for example by Prosser in the 1955 edition of his widely used hornbook, that a "supplier of chattels for a consideration may be liable for harm to the person or property of a third person if he has failed to exercise reasonable care to make the chattel safe for the use for which it is supplied." The words "product liability" do not even appear in this text. A product manufacturer's liability to users of his product was premised upon his negligence: Upon conduct "which falls below the standard established by law for the protection of others against unreasonably great risk of harm." Restatement of Torts § 282. That standard was universally acknowledged to be the conduct which would be expected of a "reasonable man of ordinary prudence."

All that changed with the decision of the Supreme Court of California in *Greenman* v. *Yuba Power Products, Inc.*, 54 Cal. 2d 57, 377 P. 2d 897 (1963) and the subsequent formulization of that cases rationale in Restatement (Second) of Torts § 402A (1965).

Greenman and § 402A imposed "strict liability" on the commercial seller of a product which is "defective" (and in the case of § 402A, "unreasonably dangerous"). No fault need be shown. Conduct is not in issue. A manufacturer is liable if a product which he manufactured is "defective" and if that "defective" condition is the proximate cause of the plaintiff's injury. But when is a product "defective"?

Greenman dealt with what we would call, in the language of S. 2631, a "construction defect": a product's failure to conform to its manufacturer's specification. The authors of § 402 apparently had the same sort of thing in mind. The Reproter's Notes which were published with § 402A contain, for example, the very suggestive observation that "good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful." In this context, what § 402A proposed, while hardly a "restatement" of existing law, was quite reasonable. If a product deviates from its own manufacturer's specifications, and if someone is injured as a result, it is reasonable to hold conclusively that the manufacturer was at fault. At least it is a more reasonable position than to demand that the injured person prove by a preponderance of the evidence that the manufacturer was at fault. S. 2631 incorporates this principle by its section 5(a) and even makes its application stricter. In section 7 it extends this principle, again very reasonably, to a manufacturer's express warranties. If a product does not conform to its manufacturer's representations about it, and if someone is injured by that aspect of the product, the manufacturer is strictly liable.

(2) *Strict liability for design defects and for failure to warn or instruct.*—Following *Greenman* and § 402A, the courts were not content to leave the matter there. They went on to define quite different contexts in which a product might be "defective" for purposes of imposing strict liability.

In *Pike* v. *Frank G. Gough Co.*, 2 Cal. 3rd 465, 467 P. 2d 229, 236 (1970), the Supreme Court of California again broke new ground by holding that "there is no rational distinction between design and manufacture in this context since a product may be equally defective and dangerous if its design subjects protected persons to unreasonable risk as if its manufacture does so." Two years later, in the landmark case of *Cronin* v. *J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P. 2d 1153 (1972), in which the same court spread confusion over an already confused situation by opting for the *Greenman* formula over that of § 402A, it held a manufacturer strictly liable where a product was "defective" because use of a different alloy in its design would have prevented the injury. No evidence was permitted that the manufacturer had acted reasonably or that the product, as designed, was not unreasonably dangerous. The court explained, 501 P. 2d at 1162, that "a 'defect' may emerge from the mind of the designer as well as from the hand of the workman." Needless to say, it is routine today for a product liability claim to allege that a different product design would have prevented or mitigated the claimant's injuries. The trial of such a claim then becomes a contest between alleged experts in design engineering.

Having held that a product may be defective either in construction or in design, the courts then went on to hold that a product could also be "defective," and the product seller strictly liable, because of a failure to provide proper warnings or instructions. As in construction and design cases, the reasonableness of the seller's conduct is not an issue. The bellwether case seems once again to come from California: *Cannifax* v. *Hercules Powder Co.*, 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965). Today it is a commonplace observation of corporate risk managers that every product liability case is at least potentially a failure-to-warn case. Alleging a failure to warn avoids for plaintiffs the messy task of demonstrating a contruction or design defect.

Having reached the point that a manufacturer or seller, regardless of the reasonableness of his or her conduct, may be strictly liable where a product is "defective" for failure to use the design or to provide the warning which plaintiff's "experts" say would have been safer, it was a short step for the Supreme Court of Pennsylvania to hold that a product is defective if it lacks "any element" necessary to make it safe, or for the Supreme Court of California to hold that a product is defective if after the plaintiff proves that the product injured him, the defendant fails to prove that it was *not* defective.

(3) *We must make a choice: Are we to have a reparation system or a compensation system?*—What is the engine that has driven these cases and brought product liability law to its present pass? In two words, risk distribution. A very explicit economic rationale underlies these cases: As between a product seller and a product user, better that the cost of injury fall on the product seller since he is able to distribute that cost over all the purchasers of his product. What the courts have been concerned with, in short, is compensation. What the tort system is concerned with is reparation. The courts want to assure that there is a remedy for every harm, and that it is provided by the person best able to pay and to distribute the cost. That is not, however, what our tort system has traditionally been about. The tort system has been premised on the principle that a person is responsible for the consequences of his or her acts and if, therefore, one intentionally or negligently harms another person, one has an obligation to repair the harm.

There would be nothing wrong with a compensation system for injuries caused by products. New Zealand has one. Congress could design and enact one. It would, of course, be very different from the system we have today. We do not believe that the public wants it or could afford it, but it could be done. What the courts have given us, however, in the case of product liability, are compensation-system standards of liability and reparation-system levels of benefits and procedures for dispute resolution. The result is that a few claimants receive enormous windfalls, transaction costs exceed recoveries, insurance costs escalate, the viability of small business is threatened, entrepreneurship becomes a game of chance. We have a system which does not work and is creating problems which will get much worse if it is not put back on a sensible basis.

S. 2631 makes the changes in the law which we and most of those who have commented on this and previous reform proposals believe to be critical: while retaining and even strengthening strict liability for construction and warranty cases, it reinstates fault as the standard for design and warning cases. In short, it opts for a tort system, not a compensation system. There is no other obvious way to go.

CONCLUSION

NEMA has, in summary, attempted to make these points:

1. S. 2631 is the product of an extraordinary process of public participation and consensus-building.

2. Out of this process has come broadly based agreement on the need for federal legislation and virtual consensus on the need for and appropriateness of the key provisions of S. 2631.

NEMA repeats its strong support for S. 2631 and commends the bill's sponsors, especially the Chairman, for their leadership.

Senator KASTEN. Mr. Connor, thank you.

The next witness is Mr. Jay Angoff, staff attorney for Congress Watch, Washington, D.C. Mr. Angoff.

Mr. ANGOFF. Thank you, Mr. Chairman.

My name is Jay Angoff. I am a lawyer with Congress Watch, and I appreciate the opportunity to testify here today.

I would like to briefly discuss two questions: First, whether a Federal product liability bill should be enacted; and second, if such a bill should be enacted, whether the Kasten bill at least furnishes a reasonable starting point for such legislation.

Now, in answer to the first question, we think that there are four reasons why a Federal bill, no matter how proplaintiff, should not be enacted:

First, the common law, that is court decisions, can change as times and technology changes. A Federal statute cannot change. Times and technology will continue to change. Therefore, the statute is frozen in stone while times and technology march on. Either the courts can torture the language of the statute in order to reach a fair result or the statute quickly becomes outmoded and unfair. We believe, therefore, that we are better off if tort law remains common law.

Second, to enact the Federal product liability statute is just an enormous task. There are scores of issues in product liability. There are hundreds, sometimes thousands, of decisions on each issue. Eminent legal scholars have spent substantial parts of their careers studying just one or a few of these issues, and we just think that to enact a clear workable statute that is reasonably fair to both plaintiffs and defendants is a monumental undertaking. It has not been done. We do not think it can be done.

The third reason we oppose a Federal product liability statute is that it would create an enormous amount of confusion and complexity that does not exist today. Now, it is true that in product liability law, just like in other areas of law, there are differences between the States in treating those laws. However, any problems that the difference in product liability law among the States would cause pales by comparison to the problems a Federal statute would cause.

And the reason is that the Federal statute would be interpreted by all 50 States, by the State courts in all 50 States, by the hundreds of judges in each State court. So what you would get is a Federal product liability bill interpreted in 50 different ways. You would have the 50 different State laws that we have today, plus in addition you would have another layer of law, a Federal law on top of that.

The confusion and complexity would be much worse than it is today. We believe the only people who would benefit would be the lawyers.

The fourth reason that we are against a Federal product liability statute is that we represent consumers, consumers are plaintiffs, and we believe that plaintiffs are a lot better off, have a much better chance in court than they do in Congress. And the reason is that in court plaintiff and defendant are equal. They have the same weapons. They have the facts, the law, their ability to argue the case and to apply the law to the facts.

In Congress, on the other hand, the other side, the defense side, has a lot more weapons that we do not have. They can contribute to your campaigns, they can give you money for speeches you make, they can go in limousines to pick you up to take you to those speeches. They can give you all kinds of perks. We cannot do that.

We simply think that it is an even fight in court, it is not an even fight in Congress. Therefore we prefer to stay in court.

Now, turning to the specifics of the Kasten bill, what the Kasten bill does is preempt all State tort laws and impose on the States one Federal solution. Now, this approach is clearly anathema to the administration. We do not particularly take a position one way or the other on the federalism aspects of it, but we do believe that a Federal statute cannot work.

But assuming that the administration did want to take more power from the States and give that power to the Federal Government and assuming that a Federal statute could work, we would still oppose the Kasten bill. The reason is there is nothing for plaintiffs in the Kasten bill. Every issue that is not completely settled and even some issues that are completely settled are resolved in favor of the defendant and against the plaintiff.

In our written testimony there is an analysis of what we believe are the 18 key provisions of the bill, all of which are resolved against the plaintiff and in favor of the defendant. I will not go through those here, but I would like to mention just one provision which we seem to agree, both sides seem to agree, is the most significant provision, and that is the elimination of strict liability for design.

Today a manufacturer can make any product he wants, no matter how dangerous and no matter how useless, but if that product injures someone and the product is more dangerous than it is useful the manufacturer is liable and the plaintiff can recover. What the Kasten bill does is say ignorance is an excuse. If the plaintiff cannot prove that the defendant knew or should have known that his product would cause injury, the plaintiff is out of luck.

Now, this is the way the law was in the last century. It is not the way the law is today. We do not believe that it is the way the law should be tomorrow.

So in conclusion, Mr. Chairman, we believe that the bill is a business wish list. It allows businesses to reap the full profits of doing business without paying the full cost of doing business. We therefore respectfully suggest that you withdraw the bill.

Thank you very much.

[The statement follows:]

Statement of Jay Angoff, Staff Attorney, Public Citizen's Congress Watch

Mr. Chairman, Members of the Committee: My name is Jay Angoff and I am a Staff Attorney with Public Citizen's Congress Watch, a public interest advocacy group founded by Ralph Nader. Public Citizen is a nationwide consumer organization with approximately 70,000 contributors annually.

I will discuss two separate questions: (1) whether a federal product liability bill should be enacted, and (2) assuming that it should, whether the Kasten bill furnishes a reasonable starting point for such legislation. Our answer to both questions is no.

WHETHER FEDERAL PRODUCT LIABILITY LEGISLATION SHOULD BE ENACTED

We oppose federal product liability legislation—no matter how well-drafted or well-balanced—for the following reasons.

First, tort law should be able to continue to grow and develop, as it has for centuries, as times continue to change and technology continues to advance. A federal statute would freeze the law in one place, while times and technology march on. As time passed, either the statute would quickly become outmoded and unfair, or courts would give it increasingly tortured interpretations in order to reach fair results.

For centuries intent was the standard in tort law: a plaintiff could recover for his injuries only if the defendant intentionally caused those injuries. Then, around 1825, the law of negligence began to develop: people became liable not only for injuries they deliberately, intentionally caused, but also for injuries they caused because they were careless.

Today, in products cases, strict liability is the law: the focus is on the *condition of the product* rather than the *conduct of the defendant*, and the defendant is held liable if the product causing the injury is unreasonably dangerous. Since *Greenman* v. *Yuba Power Products, Inc.*, 377 P. 2d 897 (Cal. 1963), and §402A of the Restatement of Torts, the courts have been struggling with the practical problems of applying strict liability to design cases. But they now seem to be arriving at a solution—*Barker* v. *Lull*, 573 P. 2d. 443 (Cal. 1978), for example, sets out a rule that is easy to understand and has already been followed by other states. For Congress to now preempt the state courts from acting, just when they are on the verge of working out some very difficult problems, would be unfortunate.

Second, writing a single statute that would deal effectively with the scores of issues involved in product liability law is an enormous task—a task much too great to be finished in a few years, or even a few decades. There are hundreds and often thousands of decisions on each issue in product liability law. Eminent legal scholars have devoted substaintial parts of their careers to analyzing just one of these issues, such as "misuse" or comparative fault. To synthesize thousands of decisions on scores of issues into one bill that is clear, workable, and reasonably fair to both plaintiffs and defendants is a monumental undertaking. It hasn't been done, and we don't believe it can be done.

Third, a federal statute would create tremendous confusion and uncertainty, and much additional work for lawyers. Any confusion that exists today because of differences in the product liability law of the different states would pale by comparison to the confusion a federal statute would engender. For a federal statute would be construed not by the federal courts—which would at least hold out the theoretical possibility of a reasonably uniform federal law—but by 50 different state courts, and thousands of different judges. Moreover, each of the 50 states has its own product liability law, and this law would not simply disappear were a federal statute enacted. Each judge would use state common law as a guide for interpreting the federal law where he thought the federal statute was unclear, or in an area that the federal statute did not cover. Thus, just as they do today, the states under a federal product liability bill would still have their own tort law—they would simply have one more layer of law to factor into the equation. As is the case all-too-often with new legislation, the real beneficiaries would be the lawyers.

Fourth, no statute, no matter how well-drafted, can possibly take account of the infinite variety of fact situations that arise in product liability law. The literal language of a statute would inevitably require nonsensical results in certain situations. A judge, on the other hand, with prior court decisions but no set-in-stone language on which to base his decision, can reach a fair result in each individual case.

Fifth, we believe that the people are better served when judges decide cases on the basis of prior court decisions and legal authorities such as law review articles and the Restatement, rather than on the basis of a statute enacted by Congress under pressure from the business lobbies. In the courtroom, plaintiff and defendant are equal. They both have lawyers, and they both make arguments based on the law. Before the legislature, on the other hand, plaintiff and defendant are not equal. Defendants are highly organized, have their own product liability "consultants" on retainer, and contribute millions of dollars to congressional compaigns. Plaintiffs, on the other hand, are not organized, and do not have the money to either put a product liability expert on retainer or contribute to congressional campaigns. We therefore believe that product liability law belongs in and should stay in the courts.

Some argue that a federal product liability statute would be a positive development because it would pre-empt all the highly regressive state statutes that have been enacted. However, existing state product liability statutes, while regressive, are narrow in scope and with very few exceptions have been enacted only in the less industrialized states, where relativiely few product liability suits are filed. Moreover, parts of some state statutes have already been held unconstitutional, and more may well be held unconstitutional. In addition, the drive to enact state product liability legislation has run out of steam. Thus, the damage caused by state product liability statutes has been minimal and in many cases may be temporary, while the damage caused by federal product liability legislation could be great and permanent.

Business groups favoring a federal product liability statute make three arguments that can be dealt with summarily. First, they argue that differing state product liability standards have caused insurance rates to skyrocket over the past few years. However, statistics show, and insurance company officials and other experts admit, that any increase in insurance rates is not due to the states being free to formulate their own product liability law. For example, in 1977 the Commerce Department's Interagency Task Force on Product Liability, headed by Victor Schwartz, concluded:

"[T]he overall conclusion drawn here is that although specific tort doctrines adopted by some courts can be considered inequitable in specific cases, the total impact of such rules on product liability claims is insufficient to directly cause an insurance problem of the magnitude alleged. In other words, *no* inequitable doctrine or group of doctrines, even if changed immediately, could produce a greater availability of or a lower cost for insurance." (Emphasis in original.)[1]

Moreover, even if different state product liability standards had been in any way responsible for increasing insurance rates, "product liability insurance premiums have leveled off or plunged during the last three years," according to Business Insurance magazine.[2]

Second, some business groups simply assert that the lack of uniformity in product liability law has deterred product development. They have yet to produce data, however, or even an anecdote that would tend to support this statement.

Finally, one occasionally hears the assertion that federal product liability legislation should be enacted because "consumers don't know their legal rights." This is silly. The implication seems to be that if consumers only knew what the law is now, they would be able to avoid being injured by unsafe products. But the problem is with the unsafe product, not the victim's knowledge of the law. All the knowledge in the world will not prevent a person from being injured by a product if that product is unsafe.

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[1] Interagency Task Force on Product Liability, Final Report of the Legal Study, Vol. III, at 126.

[2] Business Insurance, July 27, 1981, at 20.

THE KASTEN BILL

Tort law, like other branches of common law, has traditionally been a state concern, and inevitably tort law differs from state to state, just as property law or criminal law or other kinds of law differ among states. The Kasten bill tries to eliminate the differences among the states in the product liability area by pre-empting state law and imposing on the states one federal law.

This approach is clearly anathema to the administration, and we do not believe it can work. But even assuming that the administration did want to take more authority away from the states and give it to the federal government, and even assuming that we did believe a federal product liability statute could work, we would strongly oppose the Kasten bill. For the Kasten bill, under guise of establishing a uniform product liability law, would in fact make it much more difficult for people injured by defective products to recover for their injuries. It would allow businesses to reap the full benefits of doing business without paying the full costs of doing business.

A balanced product liability bill would have something in it for defendants and something in it for plaintiffs. In the Kasten bill, however, every product liability issue that is not completely settled—and even some that are—is resolved against the plaintiff.

The provision in the bill that would do the most harm in the long run is § 5(b), the section that sets out the standards for determining when a manufacturer is liable for an injury caused by a design defect. Under our free market system, a corporation is free to manufacture anything it wants, no matter how useless, and no matter how dangerous; but if the product causes harm, and its danger outweighs its utility, under modern tort common law the product is unreasonably dangerous and the manufacturer is liable. The Kasten bill would prevent courts from even asking the question whether the utility of a product outweighs the risk that it would cause harm, and would substitute a standard that effectively tells manufacturers that *ignorance is an excuse:* As long as they didn't know about the danger that their product would cause cancer, for example, and as long as the plaintiff couldn't prove that they should have known, a person injured by a defective product could never recover for his injuries—no matter how useless the product, no matter how great the danger, and no matter how much the defendant had profited by selling the product.

Adding insult to injury, the Kasten bill does not simply set down a simple standard for courts to apply: it goes on for pages and pages detailing what the plaintiff must prove, and specifying when the defendant is automatically off the hook without need for any further inquiry. Clearly, this would encourage directed verdicts for the defendant, as Prof. Aaron Twerski has said.[3] Moreover, even if the judge let the case go to the jury, under the standards set out in the Kasten bill the jury would need to act "almost heroically" or "to turn handstands," in the words of Prof. Gary Schwartz,[4] in order to find for the plaintiff in a design case.

The difficulty of a plaintiff winning a design case is increased still further by the jury instructions that would be required under the Kasten bill: when a jury hears over and over again what the plaintiff must prove to win a design case, and over and over again about how many different ways a defendant may automatically escape liability in a design case, it is clear that victories for the plaintiff in design cases would be rare indeed.

What follows is a short analysis of what we consider to be the 18 most pro-defendant, anti-plaintiff provisions in the Kasten bill.

1. *Ability to recover for emotional distress—§ 2(5).*—Section 2(5) of the bill allows the plaintiff to recover for mental anguish or emotional harm only if "caused by the claimant's personal physical injury, illness or death." The original October 15 staff draft at least allowed plaintiffs to recover for emotional harm that is related to physical injury—whether suffered by the claimant or someone else—as is the case under current law. See, e.g., *Molien* v. *Kaiser Foundation Hospitals,* 616 P. 2d 813 (Cal. 1980). The National Product Liability Council, however, suggested that plaintiffs be able to recover only if their emotional injury is caused by their own physical injury. The Kasten bill adopts the NPLC's suggestion. As a practical matter, this will make it much more difficult for people to recover for emotional distress—there will be endless arguments, for example, over whether a plaintiff's emotional injury was "caused by" his physical injury.

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[3] Telephone interview with Aaron Twerski, Professor of Law, Hofstra University Law School, June 22, 1982.

[4] Telephone interview with Gary Schwartz, Professor of Law, UCLA Law School, June 23, 1982.

2. *Definition of "reasonably anticipated conduct"—§ 2(13).*—The Kasten bill generally holds defendants liable for the results of "reasonably anticipated conduct" on the part of the plaintiff, but not liable for the results of conduct that is not "reasonably anticipated." In section 2(13), it defines "reasonably anticipated conduct" as the "conduct which would be expected of a reasonably prudent person who is likely to use the product in the same or similar circumstances." However, much conduct that is not the conduct of a reasonably prudent person nevertheless can be anticipated, such as standing on a chair, ***Phillips*** v. ***Ogle,*** 285 P. 2d 857 (Cal. 1951), wearing a cocktail robe near a kitchen stove, ***Ringstad*** v. ***I. Magnin,*** 239 P. 2d 848 (Wash. 1952), or operating a tractor downhill at fast speed, causing the engine compression to break, ***Lovejoy*** v. ***Minneapolis-Moline,*** 79 N.W.2d 688 (Minn. 1956). Under traditional negligence law, the defendant is liable for the results of foreseeable conduct; under the draft, the defendant is liable only for the results of the conduct of a reasonable prudent person, even if conduct other than that of a reasonable prudent person is foreseeable. Wherever the term "reasonable anticipated conduct" is used, therefore, the Kasten bill does not merely turn the clock back to before strict liability; it turns the clock back to before negligence.

3. *Overruling Sindell and Summers v. Tice and Their Progeny—§ 4(a)(2).*—Section 4(a)(2) requires the plaintiff to prove "that the product unit which allegedly caused the harm complained of was manufactured by the defendant." In the ordinary case, this is the law. But when the plaintiff can prove that all defendants acted negligently but cannot prove which defendant caused his injury, under present law the burden shifts to each defendant to prove that he did not cause the plaintiff's injury. For example, in ***Summers*** v. ***Tice,*** 199 P. 2d 1 (Cal. 1948), two hunters fired their guns at the same time, and the bullet from one struck the plaintiff in the eye. The plaintiff proved that the bullet that hit him came from one of the guns, but had no way to prove which one. The burden therefore switched to each defendant to prove that he had not fired the bullet that hit the plaintiff. ***Accord,*** Restatement of Torts (Second), sec. 433B; see also ***Ybarra*** v. ***Spangard,*** 154 P. 2d 687 (Cal. 1944).

Similarly, in ***Sindell*** v. ***Abbott Laboratories,*** 607 P. 2d 924 (Cal. 1980), a girl who got cancer because her mother took the drug DES proved that DES was unreasonably dangerous and that manufacturers of DES were negligent, but had no way to prove which drug company made the specific DES her mother took. The burden therefore shifted to each of the defendants to prove that it did not make the product that caused the plaintiff's cancer, and all negligent defendants that could not prove that they did not make the product unit that caused the plaintiff's injury were liable for a percentage of the judgment in accordance with their market shares. ***Accord, Hardy*** v. ***Johns-Manville,*** 509 F. Supp. 1353 (E.D. Tex. 1981); ***Ferrigno*** v. ***Eli Lilly,*** 420 A.2d 1305 (N.J. 1980); ***Bichler*** v. ***Eli Lilly,*** 436 N.Y.S.2d 625 (1981); ***Able*** v. ***Eli Lilly,*** 289 N.W.2d 20 (Mich. 1979). See also ***Borel*** v. ***Fibreboard Paper Products,*** 493 F. 2d 1076 (5th Cir. 1973); ***Hall*** v. ***Du Pont,*** 345 F. Supp. 353 (E.D.N.Y. 1972). The rationale is that as between an innocent plaintiff and negligent defendants marketing a defective product, each defendant should bear part of the loss rather than the innocent plaintiff eating the entire loss. The manufacturer is in a better position to discover defects in its products than is the plaintiff; holding the manufacturer liable for the harm caused by such defects creates an incentive for it to make its products safe.

Section 4(a)(3) of the bill purports to mitigate the harshness of the rule in sec. 4(a)(2) by allowing the plaintiff to recover if she can meet three tests. Two of those tests, however, are impossible to meet. For example, the plaintiff would be required to prove—and to prove by "clear and convincing evidence," a much stricter standard than the traditional tort "preponderance of the evidence" standard—that she "has brought the product liability action against every manufacturer which could have produced" the product unit which caused the harm. But as the court in ***Sindell*** pointed out, "Should we require that . . . all DES manufacturers be joined in the action, [the plaintiff] would effectively be precluded from any recovery. As defendants candidly admit, there is little likelihood that all the manufacturers who made DES at the time in question are still in business or that they are subject to the jurisdiction of the California court." 607 P. 2d at 936.

Section 4(a)(3) would also require the plaintiff to prove that "each of the manufacturers against whom the action is brought is in a better position because of superior knowledge or information than the claimant to establish which manufacturer actually produced" the product unit which caused the plaintiff's injury. But the problem is not that the plaintiff doesn't know who caused her injury and the defendants do;

the problem, as the *Sindell* court emphasized, is that usually nobody knows.[5] The Kasten bill with section 4(a)(3) thus closes the courthouse doors to DES victims—as well as to people who have had their eyes shot out by one of two negligent hunters, as in *Summers* v. *Tice*—every bit as much as did the staff draft without section 4(a)(3).

4. *Prohibition on expert testimony unless "supported or corroborated"—§ 4(b).*—In proving that the defendant's design was defective, plaintiff must prove, under the draft, that an alternative design existed. Traditionally, the plaintiff may do this by expert testimony. See, e.g., *Blohm* v. *Cardwell Mfg. Co.*, 380 F. 2d 341 (10th Cir. 1967); *Self* v. *General Motors Corp.*, 116 Cal. Rptr. 575 (1974); *Melia* v. *Ford Motor Co.*, 534 F. 2d 795 (8th Cir. 1976). But section 4(b) of the draft prohibits the plaintiff from successfully using expert testimony "unless it is supported or corroborated by sound objective evidence." This both flies in the face of existing law and makes it much more difficult for plaintiff to prove an alternative design, since the "sound objective evidence" criterion would seem to require him to actually produce the alternative design in court.

The original draft did not contain this provision; it was put into the Kasten bill pursuant to the suggestion of the Business Roundtable.

5. *Prohibition on collateral estoppel—§ 4(d).*—Collateral estoppel is a doctrine, approved by the Supreme Court in *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 328 (1979), that saves courts and litigants money and time by allowing a fact established in one case to be used in another case involving the same defendant. For example, if a woman who had taken thalidomide and gave birth to a baby with no arms or legs proved that the drug company was negligent in marketing the thalidomide, another mother of a thalidomide baby would still need to prove the elements of her particular case, but the negligence of the manufacturer would already be established.

Section 4(d) of the bill gives the court discretion to allow collateral estoppel where "both actions were based on harm caused by a single event in which two or more persons were harmed," i.e., in mass accident cases, but it prohibits its use in all other cases, such as those involving dangerous drugs.

6. *Elimination of strict liability for design defects—§ 5(b).*—Section 5(b) eliminates strict liability for design defects and replaces it with a standard that is even more difficult for the plaintiff to meet than the traditional negligence standard: the plaintiff must prove that "a reasonably prudent manufacturer in the same or similar circumstances would not have used the design that the manufacturer used." This definition arguably makes the industry custom controlling: in order for a manufacturer to escape liability for an unreasonably dangerous design used by the entire industry he would merely need to have the other manufacturers testify that they would have used the design. Since they all used the same design they would, of course, be only too glad to oblige each other.

Legal obligations, however, have historicaly been determined by the courts, not manufacturers. See *The T. J. Hooper*, 60 F.2d 737 (2d. Cir. 1932) (L. Hand, J.). Even if all manufacturers in an industry use the same design, it can still be unreasonably dangerous. See, e.g., *Marsh Wood Products* v. *Babcock & Wilcox*, 240 N.W. 392 (Wis. 1932). Section 5(b) arguably allows a defendant to escape liability simply because everyone else in the industry has designed his product as unreasonably dangerously as he has.

The language of section 5(b) was suggested by NAM.

7. *Elimination of strict liability for design defects—§ 5(b)(1), (2).*—Section 5(b) absolves the manufacturer from liability for design defects unless the plaintiff can prove that the manufacturer knew or, "based on substantial support in the scientific, technical or medical community," should have known about the danger, and unless a way to eliminate that danger was feasible. This standard completely ignores the question of the utility of the product. Under this standard, if there was no way to eliminate the danger that caused the harm the manufacturer can not be liable, *regardless of how useless the product is.* See discussion in next section re "unavoidably dangerous aspect."

The liability standard in § 5(b) was not in the original staff draft but was put in the Kasten bill at the request of NAM and the Business Roundtable.

8. *Definition of "unavoidably dangerous aspect"—§ 5(c).*—Section 5(c) provides that a manufacturer is not liable for harm caused by an "unavoidably dangerous aspect" of a product. It defines "unavoidably dangerous aspect" as an aspect of a product

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[5] However, a defendant may be able to prove that it could not have made the product unit that caused the plaintiff's injury. If it does it is not liable. For example, the *Sindell* court dismissed one defendant because that defendant proved that it did not begin making DES until after the plaintiff was born.

that could not be eliminated "in light of knowledge which had sound support in the scientific, technical, or medical community" without "seriously impairing the effectiveness with which the product performs its intended function or the desirability, economic and otherwise, of the product to the person who uses or consumes it."

This language would allow a manufacturer to escape liability for injuries caused by a product that could not be made safe without eliminating a dangerous part of it, *regardless of how useless that product is.*[6] Thus, if the only way one could make, say, feminine deodorant spray, was with a chemical that caused cancer, a woman who got cancer after using feminine deodorant spray could recover nothing for her injuries.

The term "unavoidably dangerous" is a legitimate one, and manufacturers are not today liable for injuries caused by products (rather than aspects) that are unavoidably dangerous, i.e., dangerous products whose utility nevertheless outweighs the likelihood that they will cause harm and the magnitude of that harm. For example, the rabies vaccine is undoubtedly dangerous but its utility is enormous, since the alternative is the worst death known to man. See generally Prosser and Wade, Cases and Materials on Torts, at 721-23 (5th Ed. 1971); cf. *Davis* v. *Wyeth Labs,* 399 F.2d 121 (9th Cir. 1968). A toy, on the other hand, under present law could never be unavoidably dangerous. Under the draft, it could.

In short, under current law, a manufacturer may be liable in placing a dangerous product on the market at all, even if there is no safer alternative; under the staff draft, a manufacturer could never be liable in placing a product for which there is no safer alternative on the market—even if the product is absolutely useless to society.

9. *Alternative design—§5(d).*—Section 5(d) makes it virtually impossible for a plaintiff to prove an alternative design, since he must prove, among other things, that based on sound scientific support the defendant should have known of the alternative design, and that this alternative would have been desirable in all ways to the plaintiff. Defendants can thus escape liability by arguing that while the alternative design was possible, there was not "sound" scientific support for it; and that while the alternative would have performed its intended function every bit as well, it was clearly not as desirable to the user because the user didn't use it. For example, suppose black shoes caused cancer but brown shoes didn't. Under section 4(c)(3), no manufacturer could be liable to a person contracting cancer from black shoes—even if the manufacturer knew that black shoes cause cancer—because the very fact that the plaintiff bought brown shoes showed that brown shoes were more "desirable" to him than were black shoes.

The language of §5(d) was not in the original staff draft but was put in the Kasten bill at the request of the National Association of Wholesaler-Distributors, NAM and the Business Roundtable.

10. *Elimination of strict liability for failure to warn—§6.*—The failure to warn section of the bill, section 6, suffers from many of the same inequities and inadequacies as does the design defect section, section 5(b). As it does in design cases, the bill eliminates strict liability for failure to warn and replaces it with a standard more difficult for a plaintiff to meet than the traditional negligence standard.

In addition, it absolves the manufacturer of liability for failing to warn the injured party as long as he makes reasonable efforts to warn a third party. But whether a manufacturer has a duty to warn the ultimate product user should depend on whether or not a manufacturer has a reasonable means to do so.[7] If he does, he should be liable; if he doesn't, he shouldn't.

The Kasten bill, however, absolves the manufacturer from a duty to warn the ultimate product user without even asking whether he has a reasonable means to give that warning.

11. *Definition of obvious danger—§6(d)(2)(A).*—Section 6(d)(2)(A) absolves the defendant from liability for failing to warn of dangers that are obvious to "a reasonably prudent product user." However, the term "reasonably prudent product user" excludes many people who while not reasonably prudent product users are nevertheless likely to use the product and to come into contact with the danger. Since the manufacturer can reasonably foresee that such people will use his product, he should be excused from failing to warn against an "obvious" danger only if that danger is obvious to all people who are likely to use the product, whether they are reasonably prudent or not.[8]

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[6] Interview with John Wade, Professor of Law, Vanderbilt Law School, at Marshall-Wythe College of Law, Williamsburg, Virginia, April 2, 1982 (hereinafter Wade interview).

[7] Wade interview.

[8] Moreover, while there may be no duty to warn about dangers that are obvious, there may be a duty to warn about how to avoid an obvious danger. Wade interview.

12. *Definition of puffing—§ 7(a)(3).*—Section 7(a)(3) provides that a defendant is not liable for puffing, by excluding from the definition of "material fact" "a general opinion about, or general praise of, the product or its quality." Puffing is certainly a legitimate concept. But suppose the seller's general opinion about the product is that the product is "safe"? This is another example of why the common law is better than a statute in the torts area—the language of the statute would require nonsensical results.[9]

13. *Elimination of strict liability for non-manufacturers—§ 8.*—Section 8 of the draft eliminates strict liability for all defendants except manufacturers, and substitutes a standard more difficult for plaintiff to meet than the traditional negligence standard. In addition to his traditional negligence case, he must prove that a specific product seller caused his injury, and he may not use expert opinion unless it is "supported or corroborated by sound objective evidence."[10] He is also prohibited from using collateral estoppel in most cases. Finally, he is barred from suing the product seller if the product seller sells a pre-packaged product.

Under current law, on the other hand, non-manufacturers can be strictly liable even if the product passes unopened through their hands. Strict liability applies to any seller engaged in the business. See, e.g., *Durham* v. *Vaughn & Bushness*, 247 N.E. 2d 401 (Ill. 1969); *Vandermark* v. *Ford*, 391 P.2d 168 (Cal. 1964); *Suvada* v. *White Motor*, 210 N.E. 2d 182 (Ill. 1965); Restatement of Torts (Second), sec. 402A, Comment F. The rationale is that as between an innocent plaintiff and the seller of a defective product, the seller should bear the loss. This creates an incentive on the part of the seller to do all he can to make sure that the product he sells is safe.

A non-manufacturer product seller is strictly liable, like the manufacturer, for construction defects (neither sellers nor manufacturers are ever strictly liable for design defects for failure to warn) if the manufacturer can't be served or is insolvent. The purpose of this section—to allow the retailer to avoid the trouble and expense of suit, since in most cases ultimate liability lies with the manufacturer—is certainly defensible. Yet if the plaintiff, knowing he has no negligence claim against the retailer, does not name the retailer in the suit, he may be out of time before the court holds the manufacturer to be insolvent. If he does name the retailer, the retailer still must go to the trouble and expense of hiring a lawyer.

14. *Elimination of joint and several liability—§ 9.*—Under traditional tort law, tortfeasors responsible for the same injury are jointly and severally liable—i.e., the plaintiff gets his full recovery however he chooses from the defendants that have caused his injury, and it is then up to the defendants to straighten things out amoung themselves. See generally Prosser and Wade at 350–82. Tortfeasors are severally liable—i.e., liable only for a part of the damage—only where they have caused two distinct harms or a reasonable basis exists for determining the contribution of each cause to a single harm. Restatement of Torts (Second), sec. 433A. Even where there is such a reasonable basis, the judge may hold all defendants jointly and severally liable where justice requires it. And the defendant always has the burden of proof on the issue of apportionment of responsibility in joint tortfeasor cases. Restatement, sec. 433B. A proved wrongdoer who has harmed the plaintiff should not be able to escape liability merely because the harm he has inflicted has combined with similar harm inflicted by other wrongdoers. Restatement, sec. 433B, Comment C.

Once again, the Kasten bill turns traditional tort law on its head. Section 9(b) requires the court to instruct the jury to determine "the percentage of total responsibility for the claimant's harm to be allocated to each claimant, to any third-party defendant, and to any other person, including an employer or coemployee." The court has discretion to treat two or more persons as a single party—i.e., to make tortfeasors jointly and severally liable—but the presumption apparently is that tortfeasors will normally only be severally liable, especially since sec. 9(c) orders the court to "enter judgment against each party determined to be liable in proportion to the degree of responsibility."

Moreover, section 9(d) provides that if the plaintiff cannot collect from one defendant, that defendant's share is split up among the other defendants (or among the other defendants and the plaintiff if the plaintiff was partially at fault himself), but the defendants remain severally liable only.

15. *"Misuse"—§ 10(a).*—Section 10(a) of the Kasten bill, which defines and discusses "misuse," is very regressive in three ways. First, it reduces the plaintiff's

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[9] Wade interview.

[10] Professor Twerski has suggested that there is no way to know what "supported or corroborated" means in this context, and that only rape cases provide an analogy. Telephone interview with Professor Aaron Twerski, June 25, 1982.

damages not only because of his own misuse but because of the misuse of a third party. This is consistent with the Kasten bill's theme of "when in doubt, let the *plaintiff eat the loss.*"

Second, it expressly provides that "the trier of fact may determine that the harm caused by the product occurred solely because of misuse of the product." This provision in effect could allow the plaintiff's contributory negligency to bar his recovery, thereby undercutting the comparative fault purported to be established in § 9.[11]

Third, the definition of "misuse" in the Kasten bill is overbroad with a vengeance. Misuse occurs, according to the bill, "when a product is used . . . for a purpose or in a manner which is not consistent with the warnings or instructions available to the user, or which is not consistent with reasonable practice of users of the product, or when a product user fails adequately to train its employee in the safe use of the product, or otherwise provide for the safe use of the product. . . ."

This definition makes it even more clear that the plaintiff's damages are reduced by the misuse of another. Moreover, it ignores the basic tort concept of foreseeability. At common law, a defendant is liable for injury caused when his product is used in a foreseeable manner; he is not when it's not. See, e.g., *General Motors* v. *Hopkins*, 548 S.W.2d 344 (Tex. 1977); *Findlay* v. *Copeland Lumber Co.*, 265 Or. 300; *Ritter* v. *Narragansett Electric Co.*, 283 A.2d 255 (1971). See generally Twerski, The Many Faces of Misuse: An Inquiry Into the Emerging Doctrine of Comparative Causation, 29 Mercer L. Rev. 403 (1978); Noel, Defective Products: Abnormal Use, Contributory Negligence and Assumption of Risk, 25 Vand, L. Rev. 93 (1972).

Clearly, many uses that are foreseeable are nevertheless not the "reasonable practice," such as, for example, car crashes. Yet the definition in the bill would seem to allow auto makers to escape liability for car crashes on the grounds that crashing "is not consistent with reasonable practice of users of the product." Even the last court that held onto this regressive doctrine admitted its error and overruled the discredited *Evans* case, which the draft's definition of misuse apparently codified, in *Huff* v. *White Motor Co.*, 565 F. 2d 104 (7th Cir. 1977). See also *Mickle* v. *Blackmon*, 166 S.E. 2d 173 (S.C. 1969(; *Ford* v. *Zahn*, 265 F. 2d 729 (8th Cir. 1959); *Larsen* v. *G.M.*, 391 F. 2d 495 (8th cir. 1968).

16. *Alteration or modification—§ 10(b).*—The Kasten bill's treatment of alteration or modification, in § 10(b), is also regressive. As it does with misuse, the bill reduces the plaintiff's recovery not only because of plaintiff's own alteration or modification but also because of a third' party's alteration or modification.

The bill does provide that the plaintiff's damages shall not be reduced by alteration or modification if "the alteration or modification was reasonably anticipated conduct, and the manufacturer or product seller failed to provide adequate warnings or instructions with respect to that alteration or modification." However, many alterations and modifications, while not "reasonably anticipated conduct" as defined in § 2(13), are nevertheless foreseeable. The plaintiff's damages should not be reduced if the alteration or modification was foreseeable—particularly if the alteration or modification was made by a third party.

17. *Statute of repose—§ 12.*—Section 12 insulates manufacturers from liability for injuries caused by a defective design or by the manufacturer's failure to warn about any capital good more than 25 years old. While some of the less populated states have enacted statutes providing for shorter time periods, covering more products, and applying to more kinds of cases, any such "statute of repose" is inherently unfair and could not exist at common law. "A bomb is nevertheless deadly it if contains a time mechanism." *Fredericks* v. *American Export Lines*, 227 F. 2d 450, 452 (2d Cir. 1955) Under a statute of repose, manufacturers would have no incentive to make their products safe for longer than the term of the statute, since they would be insulated from liability after that period.

Moreover, the 25 year statute in the bill could well result in the worst of all worlds: a 25-year statute nationwide for design and failure to warn cases, plus the existing state law statutes for construction cases.

The Kasten bill also contains an "alternative section for time limitation on liability" that bars all design and failure to warn cases involving products more than 10 years old unless plaintiff can prove "by clear and convincing evidence"—a substantially stricter standard than the traditional tort "preponderance of the evidence" standard—that the product that caused the injury was unreasonably dangerous. It is certainly arguable that a 10 Year "presumption" that applies to all product liability cases is even worse for people injured by defective products than a 25 year statute applying only to capital goods.

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[11] Wade interview.

18. *Punitive damages—§ 13.*—Section 13 overrules established law and makes it more difficult for a plaintiff to recover punitive damages. Specifically, it allows punitive damages only if the plaintiff proves by clear and convincing evidence that the defendant acted with reckless disregard which is defined as "conduct manifesting a conscious, flagrant indifference to the safety" and "constituting an extreme departure from accepted practice." The last phrase was not contained in the original staff draft, but was put into the bill at the request of NAM and the business Roundtable.

In addition, the court determines the amount of punitive damages, not the jury, reflecting the general distrust of juries running through the draft.

In conclusion, when the initial product liability staff draft was released we were shocked—it was even more pro-defendant and anti-plaintiff than the 1979 Commerce Department model Uniform Product Liability Act, which no state has chosen to adopt. The second staff draft, which with one major and a few minor changes became the Kasten bill as introduced, was still more pro-defendant and anti-plaintiff—in several cases, in fact, it simply took language that the Business Roundtable or National Product Liability Council or some other big business group had formulated and stuck it into the bill, as noted above.

In short, the Kasten bill frontally assaults decades—and in some cases centuries—of Anglo-American tort law. Reasonable people may disagree about the wisdom of specific cases; the beauty and greatness of our common law tradition lies in the ability of the courts to take account of those disagreements, and in the ability of the law to change, reasonably and on the basis of legitimate policy considerations, as times and conditions change.

The Kasten bill, however, is responsive not to legitimate policy considerations but rather to the howling of business groups that wish to return to the days of the nineteenth century. It would destroy the laws of 50 states in one fell swoop, and it would irreparably restrict the ability of people injured by defective products to recover for their injuries. We oppose it in the strongest possible terms.

Senator **Kasten**. No one can accuse us of not having a balanced panel. We want to give everybody their fair shake in this operation. I appreciate your testimony.

Mr. Schwartz, Mr. Angoff stated that a Federal product liability law would freeze the law in one place. Do you agree with that interpretation?

Mr. **Schwartz**. No, I do not. I think the bill provides stability without freezing the law. In construction defects, in express warranty, there will always be strict liability. With regard to duty to warn and duty to design, you have a standard that moves through time.

For example, practical technological feasibility, which is an important keystone in the bill, looks at the technical and scientific knowledge relating to safety of the product at the time of manufacture. As manufacturers learn more about science and technology and have better ability and skill to make better products, the liability standard that will be imposed upon them will be greater.

It is a bill that provides stability. On the other hand, it captures the knowledge of the time and moves through time.

Senator **Kasten**. Mr. Angoff, in your testimony you suggest that you would prefer a compensation system to the present tort system. Could you tell me how in your view product liability law differs from a compensation system?

Mr. **Angoff**. Sure. Mr. Chairman, with due respect, I did not suggest that we would be better off with a product compensation system. We do not support a product compensation system.

The difference is in the concept of unreasonably dangerous. Strict liability is not absolute liability. What it requires is for the tryer of fact to balance the danger of the product against the usefulness of the product. Now, if the product is very useful but is dangerous—for example, the rabies vaccine is tremendously dangerous, it creates terrible side effects, but it is very useful, and the usefulness is greater than the danger. So under strict liability, someone injured by the rabies vaccine would never be able to recover. Under a compensation system he would be.

The virtue of strict liability, though——

Senator **Kasten**. You are suggesting that you would prefer a compensation system to the present tort system? That is what your testimony is suggesting.

Mr. **Angoff**. Absolutely not. We prefer a strict liability system—that is the law today—to the negligence standard that the bill would go back to, that was before the Greenman case, before section 402A of the restatement. We do not and never have supported a compensation system.

If a product is unreasonably dangerous, plaintiff should recover. If a product is not unreasonably dangerous, the plaintiff should not recover. A compensation system would allow the plaintiff to recover just on the fact that he is injured, regardless of whether the product was unreasonably dangerous or not.

Senator **Kasten**. It seems to me that strict liability as you are describing it is very similar to a compensation system.

Mr. Schwartz, would you comment?

Mr. **Schwartz**. A number of States, including one that Mr. Angoff has cited, California, in Barker versus Lull, dropped the requirement that the plaintiff show that the product is unreasonably dangerous. And as courts drop such requirements, they come closer and closer to an absolute liability system.

There may be some slim margin of difference between worker compensation payments, which are automatic, and strict liability as it is applied in some States. But that slim margin of difference is not worth the costs that we currently endure in trial of product liability cases.

At the very heart of the tort system is the need to fix individual responsibility. It is hard for me to understand how you can fix individual responsibility other than looking at a person's conduct, which your bill does. Whether a defendant product seller acted with reasonable prudence. If they acted with reasonable prudence, they are not liable. If they did not act with reasonable prudence, liability is imposed.

Within the tort system lawyers, doctors, engineers and architects, all are judged by the standard of reasonable prudence, and for some reason a manufacturer—and it is just in a few States—is made to pay under some abstract formula or because somebody has been injured. This is simply not fair.

Senator **Kasten**. Mr. Bendorf, are you personally or are the trial lawyers in favor of a compensation system over the present tort system?

Mr. **Bendorf**. No. We are delighted with the present tort system.

We have few complaints to offer about the present tort system, primarily because—well, I will not say primarily. I will just let everyone fill in that blank.

But as a matter of fact, it represents the best that humanity has been able to demonstrate for the last 4,000 years. I am sure that the concept of individual responsibility, the concept that one should be held responsible for the consequences of his conduct or his misconduct, as the case may be will survive.

We think the tort system is alive and well, and we think that it will remain.

Senator KASTEN. I appreciate your answer.

Mr. Bendorf, I am concerned by statements in your prepared statement that questions whether the problems of this Nation can best be addressed by a strong central government. Would this legislation create any new Federal employees?

Mr. BENDORF. I have no idea whether it will create any new Federal employees. I know that it will destroy—it will eliminate the body of law relative to victims of defective products in 50 States.

Senator KASTEN. In my opinion, this legislation does not call for any new Federal employees. Do you agree with that?

Mr. BENDORF. I have no idea. I do not know whether it calls for any new Federal employees or not.

Senator KASTEN. Do you believe that this legislation——

Mr. BENDORF. If for the sake of argument you would like me to say that it calls for none, I would be happy to say that it calls for none.

Senator KASTEN. I would like you to say that it calls for none. Would this legislation call for any appropriation of Federal dollars to support this legislation?

Mr. BENDORF. If it calls for no employees, I would hope that it calls for no appropriations as well.

Senator KASTEN. So, it would not require the expenditure of additional Federal funds?

Mr. BENDORF. I would certainly hope so.

Senator KASTEN. I think it is important to recognize that what we are doing here is making an effort to simplify the law, not complicate it. We are making an effort here to reduce costs, not increase them. And in my opinion, this is entirely consistent with this administration's and my feeling about less government, not more. I also think it fits with the overall concept of New Federalism.

This strong central government idea is one that I think is wrong, and I would like to ask Mr. Connor to comment on our effort here. How do you believe this law would affect the Federal Government.

Mr. CONNOR. Well, Mr. Chairman, you are referring, I am sure, to the comment we hear often, that what is being proposed here is inconsistent with federalism or with the New Federalism. What we actually are dealing with here is a classic case of Congress exercising its power granted by the Constitution to regulate interstate commerce. Products are not manufactured for local or State markets. The majority of the products manufactured in every State go into other States. A majority of the products that are used in a State were manufactured in other States.

Companies design and manufacture products for a national market. They sell products into a national market. Product liability insurance rates are set on a national basis, unlike other liability insurance rates such as automobile insurance or malpractice.

We are dealing with a very conventional exercise of Congress authority to regulate interstate commerce. Far from this being in any way inconsistent with federalism, it is precisely what the founding fathers had in mind when they gave Congress the authority to regulate interstate commerce. It is not only not inconsistent with New Federalism, it is very consistent with 1789 federalism.

Senator **Kasten**. Mr. Angoff, you stated that the plaintiffs were not organized, suggesting that they do not make PAC contributions, and do not have the money to influence a congressional campaign. Could you tell me why, then, the Association of Trial Lawyers—which is made up mostly of plaintiffs' attorneys—was able to contribute roughly $350,000 to Members of Congress in the 1980 election?

Mr. **Angoff**. I am glad you mentioned that, Mr. Chairman. It is true that the trial lawyers do contribute money and they have contributed quite a bit in this election period, and we are glad to have them on our side on this issue.

But the money that the trial lawyers contribute is absolutely insignificant compared to the amount of money that all the members of the Product Liability Alliance and the National Product Liability Council contribute. It is virtually invisible. So sure, they contribute a few hundred thousand dollars. The defense side contributes millions. So there is just no comparison in the amount that is contributed.

Senator **Kasten**. My understanding is that Congress Watch and other kinds of groups are in the process of putting together different kinds of political action committees, for this fall's elections, or are at least publicly talking about taking a much more active role in the political process in terms of influencing votes with contributions and also with volunteer activities and leaflets and checklists and voting lists.

I do not understand. Are you saying that political activity on one side is OK and political activity on the other side is not?

Mr. **Angoff**. No, we are not. First, I can assure you that Congress Watch is not now considering, nor has it ever considered, forming a political action committee.

As far as political activity beyond the contribution of money is concerned, no, we are not suggesting that that is inappropriate. We do think, though, that there is a difference between money and other kinds of political activity, and we do think the contribution of money gives the person who contributes that money a step up on the side that does not contribute that money.

Senator **Kasten**. There are a number of additional questions that we have, but I would prefer to proceed on to the next several panels.

I would like to thank all of you. And in the case of all of the panels today, there may be additional questions from members of the committee or the subcommittee. If so, we will submit those questions to you in writing.

I thank all of you very much for appearing.

Mr. **Schwartz**. Just a footnote, Senator, if I might, because I felt the last point you raised was a pretty important one. When I had an opportunity as a professor to speak in Texas to the plaintiff's bar, they did not pick me up in a limousine; they transported me in a private plane. Frankly, they did not appear to be an impoverished group.

Thank you.

Senator **Kasten**. The next panel includes Mr. Henderson, Mr. Page, Mr. Ford, Mr. Goetz, and Mr. Greenberg. Excuse me, Mr. Henderson and Mr. Page only.

Our first speaker in this panel is Prof. James A. Henderson of the School of Law, Boston University, Boston, Mass. Professor Henderson.

STATEMENTS OF JAMES A. HENDERSON, JR., PROFESSOR, SCHOOL OF LAW, BOSTON UNIVERSITY; AND JOSEPH A. PAGE, PROFESSOR, GEORGETOWN UNIVERSITY LAW CENTER

Mr. **Henderson**. Thank you, Senator. I appreciate your inviting me here today to testify.

I have submitted a written statement that I understand will be made part of the record. In it I comment favorably on sections 4, 5, 6, and 7, indicating several places where the complexity of a particular problem area may counsel against including it in a Federal product liability act. On balance, I am favorably disposed toward Federal legislation and I believe Senate bill 2631 reflects diligent and intelligent work on the part of your staff. It is a balanced proposal that tries to be fair to all concerned. This point about fairness is what I would like to explore with you today.

We hear it said from a number of sources that any bill that would have the effect of reducing manufacturers' exposure to liability is unfair to consumers. I should like once and for all to make clear the inherent fallacy of such a categorical statement. Some measures aimed at reducing liability would be unfair to the extent that they would result in insufficient incentives being created for manufacturers to achieve reasonable levels of product safety.

But there is such a thing as too much liability or liability that is imposed so aimlessly that it cannot possibly achieve rational safety incentives. To eliminate those kinds of liabilities is to increase the fairness of the system, not to decrease it.

Thus this bill or any product liability bill must be judged by the merits of its proposals: Where does it reduce exposure? Where does it increase exposure? It should not be judged against the witless, one-dimensional standard of whether some of its provisions would reduce liability.

The point I am making can be made more directly if we stop to ask, who pays for the liability in the end. The answer is obvious upon a bit of honest reflection. Consumers pay for it in the form of higher prices and restricted choice in the marketplace.

Well, who benefits from the liability? To the extent that liability creates rational incentives for safety, we all benefit from achieving reasonable product safety levels. But remember that the "reductions in liability are ipso facto unfair" argument condemns all reductions in liability.

So the further question must be asked, who benefits from the excessive and irrational imposition of liability. The answer here is not so obvious. Injured victims benefit from getting paid, but they are a small subset of all consumers. And bearing in mind that only between 35 and 45 cents out of every liability premium dollar goes to pay victims, and that the benefits are distributed on an uneven, random basis, even that subset, the victims, are meagerly benefited.

So who are the real beneficiaries of the excesses of our product liability system? The lawyers and the adjusters, who scoop over 50 percent of the action for running the system. That is who, exactly who.

And who is paying them billions and billions of dollars a year for doing it? Consumers, that is who.

Again, if we were allocating those resources intelligently toward the end of creating meaningful safety incentives, it might be worth it. But close to 20 years of studying our product liability system makes clear to me that we are not. The deficiencies in State law lead me to conclude that we are gouging consumers to do two things: to pay a small percentage of resources to accident victims and a very large percentage to lawyers.

Now, I am not opposed in principle to the idea of taxing consumers generally to increase product prices to pay accident victims. But if that is what we want let us move to something more efficient and fair to consumers than tort law. Let us move to a system that could pay 85 cents on the dollar to victims, not 35 cents.

If my assessment of the situation is correct, who could we expect to oppose such a move most vigorously? The trial lawyers. And who has opposed such proposals at every turn? The trial lawyers.

I think the sooner we wake up to what is happening the better. And I would be glad to answer any questions you might have, including comments on earlier testimony.

[The statement follows:]

Statement of Prof. James A. Henderson, Jr., School of Law, Boston University

Thank you for inviting me here today to testify on the merits of S. 2631. I am James A. Henderson, Jr., Professor of Law at Boston University School of Law, and a member of the legal consulting firm of Keeton, Owen & Henderson. I teach and write primarily in the areas of torts and products liability law. Over the past several years I have acted as consultant to the National Product Liability Council, an association of manufacturers supporting federal product liability legislation. Notwithstanding my work for the Council, I appear today, at your invitation and with the council's knowledge and consent, to testify on my own behalf.

You were kind enough to ask me to testify before you on March 9th of this year, on the subject of the need for a federal product liability act. In my testimony, March 9th, I addressed four questions. First, do we have a serious products liability problem in this country today? Second, what are the major sources of the problem? Third, what changes in the law are necessary to solve the problem? And fourth, is Congress the appropriate legislative forum to effectuate these changes? A brief summary of my responses to these questions would go something like this: yes, I believe we have a serious products liability problem; the major sources of the problem inherent in the inability of courts to construct sensible, consistent standards for deciding design and warning cases; what is required are legislatively enacted, uniform standards to fill this void; and the only form that can adequately perform this legislative function is the United States Congress.

I shall not repeat my earlier explanations of these conclusions in my testimony today. They are available to you in the record of the March 9th hearing, and I understand other witnesses will address similar broad questions at these hearings. Of course, I would be happy to elaborate on my general conclusions in response to questions, if you deem it appropriate.

Today, I would like to offer my critique of sections 4, 5, 6, and 7 of S. 2631, the basic sections of the bill that establish the standards for imposing liability on manufacturers for harm caused by defective products. I agree in principle with much—indeed, with most—of what is contained in these sections. I believe the language could be tightened up and simplified in several places, and I would be happy to assist in such efforts in the coming weeks and months, should you desire my assistance. My critique today will focus on the substantive principles contained in the bill rather than on details of language.

Section 4, entitled "Responsibility of Manufacturers," organizes the basic elements of a product liability action, including the important element of proximate causation. Section 4 contains at least three remarkable features. First, subsection (b) states that "expert opinion is not considered sufficient evidence to support a proposition of fact unless it is supported or corroborated by sound objective evidence." Although I sympathize with the draftsman's desire to eliminate abusive use of expert testimony, I am doubtful that the courts will succeed in giving sensible, consistent meaning to the phrase "sound objective evidence." Perhaps the requirements of "practical technological feasibility" in the design section of the bill, to which I will turn attention momentarily, accomplish substantively what subsection (b) of Section 4 attempts, arguably unsuccessfully, to accomplish procedurally.

The most remarkable feature of Section 4 is its attempt to deal with the so-called "DES-causation" problem, the problem confronting the plaintiff who cannot prove which manufacturer's product injured him, but can show that the product must have come from one of a group of manufacturers joined as defendants. Subsection (a)(2) of Section 4 requires the plaintiff to prove which manufacturer's product injured him, and thus would bar recovery in the so-called "DES-causation" situation. Subsection (c), however, would allow the "group joinder" approach in some circumstances. Without going into details, I will simply observe that the DES-type cases present highly complex issues that require more than subsection (c) delivers. If you conclude that plaintiffs should not be barred in these cases, then one of two approaches are open: either rewrite subsection (c) to render it more adequate, or eliminate that subsection and subsection (a)(2), and leave the DES-type cases to be handled under developing state law.

The third feature of Section 4 on which I shall comment is contained in subsection (d), in which expansive uses of collateral estoppel are curtailed. I believe this is a fair and sensible provision and I applaud its inclusion in the bill

Section 5 is, for me, the "engine room" section that drives the rest of the bill. Manufacturing defects or "flaws," are included in Section 5, in the interests of completeness and symmetry; but they are not presently causing conceptual difficulties under state law. The provisions dealing with liability for defective design are the important provisions in Section 5. In this regard, Section 5 accomplishes two significant objectives: first, it puts design cases squarely on the basis of manufcturer's fault, which is exactly where they should be; and second, it puts needed backbone into the commonly relied upon technique of establishing the inadequacy of defendant's design by proving that a better, safer design was available to the defendant at the time of manufacture.

The essence of these provisions is the concept of "practical technological feasibility," defined as the "the technical and scientific knowledge relating to the safety of a product which, at the time of manufacture . . . , was developed, available and capable of use or implementation . . . , and economically feasible for use." Simply stated, Section 5 requires the plaintiff to show that the manufacturer was at fault in the design of his product. If the plaintiff can do that, he deserves to recover. But if he cannot—if the manufacturer was innocent of any wrong doing—the manufacturer should not be required to pay. Perhaps government should pay the unfortunate victims of unavoidable product risks, just as the government frequently pays victims of unavoidable floods, or earthquakes. But it is not fair to require an innocent manufacturer to pay for harms caused through no fault of his own.

Section 6 deals with product warnings and instructions. Like the provisions in Section 5 dealing with product designs, Section 6 places failure to warn or instruct on a fault basis which, once again, is exactly where it belongs. The bill distinguishes between two types of warnings and instructions: "necessary warnings and instructions," which must accompany the product when it is first sold into commerce; and "postmanufacture warnings and instructions," which must be given when and if new knowledge of product-related risks comes to the manufacturer's attention after first distributed. It is not clear to me that the bill ought to tackle the problem of postmanufacture duties to warn. I agree that such duties arise under some circumstances, and I approve in general of the approach taken to them in Section 6. But my feeling here is somewhat like my feeling about the DES-causation problem—should a federal bill address such a potentially complicated subject? If you come to share my concerns in this regard, one way to handle it would be to limit Section 6 to what are described as "necessary warnings and instructions," and to expressly leave the question of postmanufacture duties to warn and instruct to state law.

Section 7 covers express warranty. Like the provisions in Section 5 dealing with manufacturing defects, Section 7 appears to have been included in the interest of achieving completeness and symmetry. Express warranty seems to me to be adequately dealt with by uniform state law. I have no great quarrel with the provisions of Section 7; I simply raise the question of whether it is needed.

As I trust my remarks have indicated, I support S. 2631 as a balanced, sensible response to a serious and growing products liability problem in this country. It is a good bill, and can be made better. My suggestions here and there that certain aspects be left to state law do not stem from any serious concern that the bill represents an excessive intrusion into the sovereignty of the several states. Instead, they reflect the more practical view that, above all, a federal product liability act must be workable, as "minimum maintenance costs" by the federal judiciary, if it is to accomplish its objectives.

Thank you again for inviting me here today to testify regarding S. 2631. I shall be glad to answer any questions you may have.

[The following information was subsequently received for the record:]

SUPPLEMENTAL STATEMENT OF PROF. JAMES A. HENDERSON, JR.

A REPLY TO THE STATEMENT OF JAY ANGOFF

I testified before your Subcommittee on March 9, 1982, and again on June 30, 1982, in support of S. 2631, the Product Liability Act. I listened to and read with interest the testimony of a number of other witnesses, some of whom oppose the bill. Although I disagree with much of their criticism, one written statement in particular—the one submitted by Mr. Jay Angoff on June 30—moves me to supplement my own testimony in order to correct a number of misstatements and misconceptions contained in Mr. Angoff's statement. Mr. Angoff begins his testimony by stating that he and his group oppose Federal product liability legislation "no matter how well-drafted or well-balanced." Such a statement should be supported with very powerful reasons. As I shall demonstrate, the reasons contained in Mr. Angoff's statement are very weak indeed.

Mr. Angoff's rejection of the idea of Federal legislation

Mr. Angoff's statement advances five reasons for rejecting the very idea of a Federal product liability bill. The first reason attempts to display a sweeping grasp of the entire history of Anglo-American tort law. Unfortunately, the statement has gotten its history all wrong. Contrary to assertions in the statement, intent was not the legal standard that preceded negligence; a very crude form of strict liability was. See Peck, Negligence and Liability Without Fault in Tort Law, Dept. of Transp. Study of Automobile Insurance and Compensation 51-56 (1970). And *Greenman* v. *Yuba Power Products, Inc.*, which Mr. Angoff's statement implies was a design case, was not a design case, but rather a manufacturing defect case. Moreover, *Barker* v. *Lull*, which the statement claims is "easy to understand" and "has already been followed by other states" has proven itself to be neither understandable nor influential. It is a confusing decision that has been soundly rejected by the overwhelmingly majority of state courts that have considered it. See Henderson. Renewed Judicial Controversy Over Defective Product Design: Toward the Preservation of an Emerging Consensus, 63 Minn. L. Rev. 773 (1979).

Not only is Mr. Angoff's history of the law of product liability inaccurate, his statement that a Federal statute would "freeze the law in one place" reflects an inaccurate reading of S. 2631. The strict liability standard for manufacturing defects and for breaches of express warranties is a standard which moves with the manufacturer, e.g., it is the manufacturer who establishes the manufacturing specifications and the express warranties which, if not met, impose liability. The reasonableness standard for design and failure to warn cases moves with "time and technology," e.g., what is reasonable conduct by a manufacturer or product seller is not "frozen" in time, but changes as knowledge about product-related benefits and risks change.

The second reason advanced in Mr. Angoff's statement for rejecting the idea of Federal product liability legislation is that it cannot possibly be workable or fair. The statement alleges that the undertaking is so monumental that no bill could ever hope to be well-drafted and well-balanced. But wait a minute. I thought we were being given five reasons why Mr. Angoff's group would reject even a well-drafted and well-balanced Federal bill. In effect, they have invited us to assume we had such a bill before us, and to listen to five reasons why we should vote "no" when the time comes. And now their second reason for voting "no" is that such a bill cannot possibly exist. This is not a "reason" for voting against the bill—it is a rhetorical device. Laid bare, Mr. Angoff's statement is saying that even a well-drafted and well-balanced Federal bill should be rejected because it cannot be well-drafted or balanced.

The statement's third reason for rejecting even a well-drafted, well-balanced Federal bill is that it would create difficulties in the state courts. With state courts implementing a Federal statute, the possibility of inconsistent interpretations is real, even though all courts, state and federal must look to Congressional intent in applying the statute. The possibility of inconsistency, however, does not warrant rejection of a Federal statute. Instead, it counsels caution in defining the parameters of Federal enhancement. Again, I believe that a "well-drafted" bill can reduce the risks of confusion and inconsistent interpretations to an acceptable minimum level, one at which the gains to be derived from clarity and uniformity far outweigh the relevant costs.

Mr. Angoff's fourth reason for rejecting Federal legislation reflects a misunderstanding of how legal rules work. A statute, he argues, would introduce specificity into the legal standards guiding decisions. As Mr. Angoff sees it, the more vagueness, the better courts are able to formulate liability standards which lead to fair results. This argument is fallacious. It overlooks the reality that vagueness in legal standards generates substantial and wasteful costs. For example, a vague liability standard requires almost every case to litigated in order for the courts to reach fair results; a judge must hear all the evidence before he can reach the "fair result" to which Mr. Angoff's statement refers. The costs of operating the court system are very real. Even if transaction costs are ignored, the truth is that fairness cannot be achieved in every case under a vague liability standard. Persons running the tort litigation system are falliable human beings; the instincts that must guide decision when the law is vague and the facts are complicated are sometimes misplaced and misguided, leading to unfair results. Clearly, therefore, what is required is an appropriate balance between vagueness and specificity is legal standards for liability. By definition, a "well-drafted" and "well-balanced" bill would—as I believe S. 2631 does—achieve such a balance. Mr. Angoff's statement errs when it argues that vagueness is always to be preferred over specificity.

The fifth reason advanced for rejecting Federal legislation is, like the second reason, a rhetorical device rather than a substantive argument. Mr. Angoff rejects Federal legislation because Congress cannot be trusted to be fair to consumers. Bearing in mind that his statement assumes at the outset the existence of a fair, well-balanced federal bill, this fifth reason comes down to this: "We would reject even a well-balanced Federal bill because of its lack of balance."

So much for the five "reasons" why Mr. Angoff and his group would reject even a well-drafted and well-balanced Federal bill.

Mr. Angoff's rejection of S. 2631 on its merits

Mr. Angoff's statement begins its critique of S. 2631 with an unnumbered series of assertions (pp. 5–8), many of which are erroneous and misleading. The statement insists, for example, that just as property law and criminal law are allowed to vary among the states, so product liability law should be allowed to vary. This assertion overlooks two important considerations. First, neither property ownership nor criminal conduct have the interstate qualities of product and distribution. Most of our major manufacturers send their products into all 50 states, and are handicapped by the patchwork quilt of different state product liability laws. Second, in those areas of property law and criminal law that are imbued with a particularly interstate flavor, uniformity has been unhesitatingly imposed, either through uniform state laws (the Uniform Commercial Code, for example) or through Federal law (the Federal securities laws, for example).

Mr. Angoff's statement goes on to assert that every product liability issue in the bill that is not completely settled under state law is resolved against the plaintiff. This assertion is patently false. For example, to the extent that Section 6 imposes broad postmanufacture duties on defendants, it enlarges on their responsibilities in many states. And the comparative responsibility provisions in Section 9 would allow plaintiffs to recover in cases where recovery is presently barred under rules governing contributory fault in many states.

But even if Mr. Angoff's criticisms are uninformed, I would be the first to admit that one of the bill's main thrusts is to eliminate what are viewed as wasteful excesses in the product liability systems of many states. As I explained in my oral testimony before your Subcommittee on June 30, 1982, tort liability is justified when it serves to deter wastefully dangerous conduct on the part of product manufacturers and sellers. Almost 20 years of study of the product liability systems in the various states convinces me that we have in many respects gone beyond the point where liability serves to deter unsafe conduct and are operating thinly disguised "victim compensation systems" based on randomly applied absolute liability. Compensation is fine in principle. But achieving it through tort law is unacceptably expensive. Data show that only between 35 and 45 cents and every premium dollar gets returned to victims, and the rest goes to pay lawyers and adjustors. And who pays the billions of dollars it takes each year to operate this kind of compensation system? Consumers, that is who. Sound product liability law would compensate legitimate claims for product harms so that victims receive their fair share of awards and consumers do not pay unnecessarily high product costs.

It follows that to the extent that the bill cuts back on the wasteful excesses under existing state law, it deserves to be labelled "pro consumer" because, rather than in spite, of the fact that it reduces certain plaintiffs' chances of recovery in certain types of cases. Moreover, Mr. Angoff is wrong on the facts when he asserts that the only substantive effects of the bill would be to reduce plaintiffs' chances of winning. The bill enlarges the rights of plaintiffs when doing so furthers the bill's objective of creating more meaningful safety incentives for manufacturers.

Mr. Angoff's 18 specific criticisms of S. 2631

Beginning on page 9, Mr. Angoff's statement presents 18 specific criticisms of the bill. As my comments will indicate, I agree with some of what his statement says; no one would argue that the bill is perfect. But most of the criticisms contained in his statement are unfounded, and several of his descriptions of existing law are downright wrong.

1. *Ability to recover for emotional distress—Section 2 (5).* Mr. Angoff cites *Molien v. Kaiser Foundation Hospitals,* 27 Cal. 3d 916, 616 P.2d. 813 (1980) in support of his statement that recovery for emotional distress by persons who have suffered no physical injury should be permitted in the bill. Contrary to the implication of the statement, *Molien* does not represent the majority rule in this country; it is distinctly the minority view. Justice Clark's dissent in *Molien* reveals the uniqueness of the court's holding when it begins by observing: "Our court today allows for the first time a money award against one who unintentionally disturbs the mental tranquility of another." 27 Cal. 3d at 933, 616 P.2d at 823. Moreover, *Molien* was a product liability case; it involved an action against a doctor based on the doctor's allegedly negligent misdiagnosis that the plaintiff's wife had syphillus. The California court emphasized the relationships between doctor and patient and between husband and wife. It concluded that the husband's mental upset could be found to be foreseeable. Mr. Angoff proposes that this ground-breaking decision be transposed to every liability case, including those involving strict liability for manufacturing defects. S. 2631 correctly rejects this expansion of product liability law.

2. *Definition of "reasonably anticipated conduct"—Section 2 (13).* Mr. Angoff would require a manufacturer to design and warn against any potentially harmful conduct by users, however bizarre or outrageous, as long as it can be "anticipated" or "foreseen." Thus, if it is foreseeable that someone may strike another with a chair, (and it is foreseeable, viewed strictly from a "could it possibly happen" perspective), then according to Mr. Angoff, the chair should be designed and marketed with that risk in mind. I submit that any rational observer will reject Mr. Angoff's position as unacceptable. In arguing for his extreme position of "conduct that could possibly be anticipated," Mr. Angoff incorrectly attributes the opposite extreme of "completely prudent conduct" to Section 2 (13) of the bill. Mr. Angoff's attribution notwithstanding, the definition in Section 2 (13) is clearly intended to embrace much more in the way of human foibles than he gives it credit for. Section 2 (13) does not employ a "reasonably prudent conduct" standard. Instead, it says "conduct which could be expected from a reasonably prudent person." This language includes the sorts of conduct that Mr. Angoff believes would be excluded—e.g. standing on a chair to reach a high shelf, or wearing a cocktail robe near a kitchen stove. Thus, Mr. Angoff reads Section 2 (13) too restrictively, giving it an extreme and unintended meaning, and advocates an equally extreme standard at the other end of the spectrum. Contrary to his assertions, Section 2 (13) occupies the sensible middle ground between these two extremes.

3. *Overruling Sindell and Summers v. Tice and their progency—Section 4(a)(2).* As my written testimony on June 30, 1982, indicates, I do not believe that Section 4(a)(2) in the present bill adequatbly handles the complex and different issues presented in the "DES-causation" cases. But I must observe that Mr. Angoff's treatment of the law in this areas is misleading and inaccurate. Although is has generat-

ed considerable scholarly commentary and controversy, *Sindell* v. *Abbott Laboratories,* 26 Cal. 3d 588, 607 P.2d 924 (1980), remains a distinctly minority view in this country. Moreover, *Summers* v. *Tice,* 33 Cal. 2d 80, 199 P.2d 1 (1948), upon which Mr. Angoff relies in attacking the language in Section 4(a)(2) actually supports the approach taken in the bill: "[It is unfair to deny] the injured person redress simply because he cannot prove how much damage each did, *when it is certain that between them they did it all. . . .*" 33 Cal. 2d at 85, 199 P.2d at 3 (emphasis supplied).

4. *Prohibition on expert testimony unless "supported or corroborated"—Section 4(b).* Mr. Angoff's reaction to Section 4(b) contains a misleading characterization of existing law governing expert testimony. Under existing law, plaintiffs frequently succeed in design cases by arguing that the manufacturer should have designed the product differently, supporting their argument with testimony from an expert (typically) an engineering professor from a local college) with no practical experience who applies basic theory to highly complex factual circumstances. Judges are supposed to screen this sort of testimony and exclude spurious and unfounded statements from the record. It is difficult, however, for nontechnically trained judges to perform this task under vague evidentiary standards of materiality and relevance. (For a description of the problems presented by abusive use of expert testimony see Donaher, Piehler, Twerski & Weinstein, The Technological Expert in Products Liability Litigation, 52 Tex. L. Rev. 1303 (1974.) Section 4(b) of the bill represents a rational approach to supply judges with a more objective standard to use in performing their legitimate, traditional function of screening out abusive examples of expert testimony. Whether it will succeed will depend on the meaning courts give to the phrase "supported or corroborated by objective evidence." In any event, Mr. Angoff's statement is misleading when it implies that attempts to check abusive uses of expert testimony are nontraditional or inherently improper.

5. *Prohibition on collateral estoppel—Section 4(d).* In precluding the offensive use of collateral estoppel, Section 4(d) conforms to the majority rule of law. The Supreme Court in *Parklane Hosiery* left to the states the decision of whether to allow offensive use of collateral estoppel, and most states have not done so. The policy reasons supporting Section 4(d)'s prohibition on collateral estoppel are powerful. Contrary to the suggestion in Mr. Angoff's statement, the offensive use of collateral estoppel would reduce rather than increase judicial efficiency, because plaintiffs would be hesitant to consolidate or settle cases and would be encouraged to delay bringing suit in order to await a favorable result in another case. Defendents would be pressured to appeal all adverse judgments, however small, because of the implications of one adverse judgment in future cases. Moreover, offensive use of collateral estoppel is unfair to defendants in product liability cases, where the individual characteristics and susceptibilities of each plaintiff exert an important influence on judges and juries in assessing liability.

6. & 7. *Elimination of strict liability for design defects—Section 5(b)(1), (2).* A basic fallacy runs throughout Mr. Angoff's analysis. Whenever he refers, as here, to the "elimination of strict liability for design defects," he leads one to believe that the bill would work a fundamental and significant change in the law. Nothing could be further from the truth. Although many courts talk of "strict liability" in design cases, in substance they apply a negligence test. When a court examines a product design and finds it unreasonably dangerous (the approach under "strict liability"), it implicitly makes a judgment about the level of care exercised by the person who deliberately designed it that way. In condemning the design, in almost every instance the court implicitly judges the designer to have been negligent. There is only one exception to this inextricable link between design-and-designer—when the designer is non-negligently ignorant of the risks his product design creates.

Thus, by imposing a fault standard in design cases, S. 2631 follows essentially the same standard that would be imposed under an "unreasonable design/strict liability" approach in the vast majority of cases. And what of the few cases involving unknown and unknowable risks, where a fault standard does make a difference? Contrary to Mr. Angoff's statement, strict liability in these unusual cases is *not* the majority position in this country. And the decisions requiring a showing of fault are the better reasoned. I recently explored both the case law and the policy analysis in Henderson, Coping With The Time Dimension in Strict Products Liability, 69 Cal. L. Rev. 919 (1980).

Returning to the specific arguments in points 6 and 7 of Mr. Angoff's statement, he argues that Section 5(b) of the bill "arguably makes the industry custom controlling." Once again, he has misread the language of the bill. The operational language to which he refers does not invoke industry custom as the standard and no reasonable person would read it that way; none of the courts that have used similar language have ever given it that meaning.

8. *Definition of "unavoidably dangerous aspect"—Section 5(c)* As I stated in my oral testimony on June 30, 1982, I am not certain that the bill needs to have this section. But my doubts in this regard stem from the possible redundancy (and thus the unnecessary complexity) generated by its inclusion rather than from any concern of the sort expressed in Mr. Angoff's statement. The source of his concern is described at the top of page 16 of his statement, where he raises the possibility of a relatively useless but very dangerous product—he uses a cancer-inducing feminine spray as an example—hurting someone, and the plaintiff being denied recovery by this section of the bill. In order to assess his criticism, I must ask a question: Is he assuming that the risks were known at the time the product was sold? If he is not—if he is assuming that the risks were unknown and unknowable—then he is simply rehashing the point he made earlier (pp. 6–7) about holding manufacturers liable even for risks that no one could have known about.

If, however, he is referring to risks of harm that were known at the time of sale, which seems to be the case, we must assume that the risks were either generally known by consumers or fully warned against—otherewise, the manufacturer would be liable under Section 6 for failure to warn. What we have, then, in a case in which a fully informed adult decides that *to her* the benefits of the spray (however trivial those benefits may seem to Mr. Angoff) outweigh the risks. Is Mr. Angoff correct that she should recover later, if and when she gets cancer? How would he feel about someone who starts smoking after the associated cancer risks are known? Should that person be entitled to recover later on? Or someone who continues to use artificial sweeteners and eventually contracts cancer—should he recover? None of these people have rights under existing law. Nor should they, in most people's opinion.

In attempting to distinguish between the feminine spray hypothetical and the traditional rabies vaccine example, in which recovery is denied, Mr. Angoff has fallen into "the trap of paternalism." He believes that recovery in the rabies vaccine case is traditionally refused because an official, independent judgment has been made that the benefits of the vaccine outweigh its risks. Transferring that perspective to the feminine spray case, Mr. Angoff imposes his own judgment that it is a defective product because he can't see how the benefits of such a spray can outweigh the risks. But his perspective is clearly flawed. Recovery in the rabies case is denied, and recovery should be denied in the feminine spray case, because a fully informed adult has made his or her own choice regarding whether the benefits outweigh the risks. Common sense suggests that a feminine spray that causes cancer would not be a popular product. But then, people continue to smoke cigarettes. In any event, Mr. Angoff is the one who posited the hypothetical and asked us to assume that women would knowingly but and use such a spray. On that assumption, the conclusion he reaches is unacceptable.

9. *Alternative design—Section 5(d).* Mr. Angoff's statement here repeats his argument in the preceding section, and is equally muddled. His "black shoes/brown shoes" hypothetical is even more far fetched than his feminine spray hypothetical because he asks us to believe not only that a difference in shoe color could affect the cancer risk, and that blackness cannot be achieved without such a risk, but also that people would willingly accept a cancer risk in order to have black shoes. But he has asked us to accept these facts as given, so we are entitled to do so. And once we do, his argument loses its force. If he insists that recovery is appropriate in the black shoe case, then how does he explain the universal rejection in this country of manufacturers' liability for harm caused by cigarettes, alcoholic beverages, and the like?

10. *Elimination of strict liability for failure to warn—Section 6.* In response to this point in Mr. Angoff's statement, I will simply ask how the bill can "eliminate" something that does not exist. Even assuming that a few state courts have imposed strict liability for defective designs, (see discussion above), none to my knowledge has imposed strict liability for failure to warn. Again, some courts may have used "strict liability" terminology; but no court has imposed liability for failure to warn about unknown and unknowable risks. (See comment k, §402A of the Restatement of Torts, Second.) Mr. Angoff cites no case-law supporting his assertion that Section 6 "eliminates" strict liability for failure to warn. I assume he would have done so if they existed.

11. *Definition of obvious danger—Section 6(d)(2)(A).* Mr. Angoff's statement criticizes the bill because it relieves manufacturers of responsibility to warn of dangers that are obvious to "a reasonable product user." Mr. Angoff would only relieve the manufacturer from warning of dangers that are obvious to anyone who might use the product. Under his analysis, given that it is foreseeable that at least a few reckless idiots will use a widely distributed product, the manufacturer must warn

against dangers that might not be obvious to the idiots, even if they are obvious to everyone else who uses the product. In making this suggestion, Mr. Angoff's statement overlooks the negaative effects that "warnings to idiots" would have on the effectiveness of sensible warnings given to reasonable people. If his approach were adopted, (as it has not been, to my knowledge, in any state), products would routinely be accompanied by silly warnings that most users would find laughable. Not only would the added length of warnings put people off, but the silly ones would give even sensible warnings a bad name. Mr. Angoff's approach would reduce rather than enhance the efficacy of product warnings.

12. *Definition of puffing—Section 7(a)(3).* If this really is one of "the 18 most pro-defendant, anti-plaintiff provisions in the bill," then plaintiffs cannot have much to be concerned about.

13. *Elimination of strict liability for non-manufacturers—Section 8.* As far as liability for manufacturing defects is concerned, the bill does not eliminate nonmanufacturers' strict liability in any case where to do so would prejudice the plaintiff's rights. As far as nonmanufacturers' liability for unreasonably unsafe design is concerned, the bill would eliminate strict liability in many states. To understand why this is an equitable change in the law, it is necessary to return to the earlier discussion of manufacturers' strict liability for product designs. It will be recalled that, in spite of the use of "strict liability" terminology, courts in this country have applied essentially fault-based standards in product design cases: when the design is condemned as unreasonable, so implicitly is the designer. But under existing law, once the product is condemned as unreasonable it is "defective" and nonmanufacturers who sell it are held strictly liable whether they have been at fault or not. Thus, retailers and wholesalers are the only ones actually being held strictly liable for bad designs under existing law; in effect, they are being held "vicariously" liable for the manufacturers' negligently designed products.

Section 8 of the bill eliminates this "upside down" imposition of strict liability in design cases by applying to nonmanufacturers the same standard—the fault standard—presently being applied to manufacturers. This is consistent with the bill's even-handed approach to manufacturing defects, where strict liability is applied to both manufacturers and nonmanufacturers.

14. *Elimination of joint and several liability—Section 9.* I have read this part of Mr. Angoff's statement a number of times, and I cannot understand the point that is being made. The bill fully protects the successful plaintiff from the risks of insolvent or otherwise unreachable defendants. Mr. Angoff admits this, and then ends his critique with the rather sterile observation, "but the defendants remain severally liable only." I can only conclude that this part was included in Mr. Angoff's statement because its author felt he had to say something bad about Section 9. This is ironic because section 9 is a pro-plaintiff section.

15. *Misuse—Section 10(a).* The statement criticizes Section 10(a) on three grounds: (1) misuse by third parties reduces liability; (2) misuse may be found to be the sole cause of harm; and (3) "misuse" is defined too broadly. Regarding the first of these criticisms, reducing the manufacturer's liability when a product is misused by a third person is consistent with existing state law. See, e.g., *Union Carbide* v. *Holton*, 136 Ga. App. 726, 222 S.E.2d 105 (1975); *Turner* v. *Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 217 S.E.2d 863 (1975). Indeed, to the extent that misuse under Section 10(a) may be found merely to reduce, rather than automatically to eliminate, liability, the bill increases the rights of plaintiffs in some states. See cases cited supra. Moreover, in assessing this aspect of Section 10(a) is must be remembered that in many cases the injured plaintiff will have an action in tort against the third party whose misuse reduces the plaintiff's recovery against the manufacturer.

The statement's criticism of Section 10(a) for allowing misuse to constitute the sole cause of the plaintiff's injury is somewhat puzzling. Under existing law in many states, misuse bars recovery in every case in which it is found to occur. Under Section 10(a), the jury must specially find misuse to be 100% of the cause, and is invited merely to reduce, but not eliminate, recovery. Mr. Angoff is overreaching here.

Regarding the criticism that the definition of "misuse" is too broad, Mr. Angoff's statement is correct when he observes that the bill does not use the word "foreseeable." But this is because state court decisions have used that word to embrace any and all manner of foolish behavior, not because of any rejection of the core concept of reasonable foreseeability. Section 10(a)(2) employs the phrase "not consistent with reasonable practice of users of the product" to capture the same sorts of improper product uses that "reasonably foreseeable" would capture if it had not already been stretched beyond recognition in state court decisions.

That Mr. Angoff's statement misconstrues the intent of the draftsman of Section 10(a) is revealed by the example he uses to illustrate what would constitute misuse under that section of the bill—motor vehicle accidents. Clearly the bill is not intended to reverse the so-called "second collision" cases which he cites in his discussion on page 22. His analysis overlooks the requirement that the misuse must proximately cause the harm in order to reduce the plaintiff's recovery. Thus, auto manufacturers owe duties under the bill to design their vehicles to be reasonably crashworthy—that is, to incorporate feasible technology to reduce injuries to occupants in the event of an accident. To be sure, the driver's misuse, not the manufacturer's inadequate design, caused the injuries that the plaintiff would have suffered even if the design had been adequate. But given the nature of the manufacturer's duty in these cases—to design the vehicle to achieve reasonable safety in the event of an accident—the driver's misuse in causing the accident that triggers second collision liability would not proximately cause the enhancement of his injuries for which the plaintiff seeks recovery. It follows that Mr. Angoff's criticism of the misuse provisions misconstrues both the intent of the draftsman and the effects of Section 10(a) in future cases.

16. *Alteration or modification—Section 10(b).* The statement criticizes Section 10(b) on the same ground that it criticizes Section 10(a)—that is, the failure to extend the manufacturer's responsibility to include each and every alteration or modification that is "foreseeable." In this instance, the bill employs "reasonably anticipated conduct" as a substitute for "foreseeable," essentially for the reasons I outlined in my comments on Section 10(a). Mr. Angoff's statement grudgingly admits that this choice of language goes part way toward solving the difficulties it identifies. Consistent with its earlier criticism of the "reasonably anticipated conduct" concept, however, the statement insists on an approach under which manufacturers would remain liable for irrational—even insane—alterations and modifications so long as it could be said later that they were somehow "foreseeable."

17. *Statute of repose—Section 12.* Enough has been said and written on this subject to cause me to refrain from adding to the mountain of words. If you would like me to reiterate the arguments supporting a repose provision, I will be happy to do so.

18. *Punitive damages—Section13.* This is another area in which much has been written pro and con in recent years. Professor David Owen has written the two leading articles. See Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257 (1976); Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1 (1982). In his more recent analysis, Professor Owen concludes: "[T]he experience of the past several years has raised questions whether the punitive damages doctrine is being abused in products cases, whether some manufacturers are being punished who should not be, and whether penalties, though appropriately assessed, are sometimes unfairly large." 49 U. Chi. L. Rev. at 59. I submit that the approach adopted in Section 13 of the bill is generally consistent with Professor Owen's analysis, and deserves the support of the Subcommittee.

Senator **Kasten**. Thank you, Professor Henderson.

Prof. Joseph A. Page, Georgetown University Law Center. Professor Page.

Mr. **Page**. Thank you very much, Mr. Chairman. It is a great pleasure to appear before you. It is also a great pleaure to be testifying with my very good friend and former classmate Professor Henderson.

My position on this bill is slightly different from his. I tend to be a bit more critical of it as it currently stands, and think that it needs a lot more study and a lot more work. My main criticism of the bill is that it fails to serve any legitimate purpose which could be assigned to it.

Before I get to that, I would like to comment very, very briefly and elaborate on one of the points of argument during the last panel, the federalism point. I would like to quote for the record what President Ronald Reagan said in his inaugural address, which was: "It is my intention to demand recognition of the distinction between the powers granted to the Federal Government and those reserved to the States or to the people."

This bill is what I would term, and not necessarily in criticism of it, "galloping federalism," the likes of which have not been seen since the golden days of the New Deal. And if we are going to have a Federal product liability act, then I would also think that Congress would have to consider very seriously other Federal statutes in areas which, in my judgment, are much more in need of Federal intervention, but areas which the Federal Government has shied away from in the past because of notions of federalism. That is, a bill for Federal worker compensation standards, a bill for Federal no-fault automobile accident standards. These things, in my judgment, are much more necessary than this bill.

Now, getting back to this particular problem that I had with the bill. The bill does not in its text spell out what its purposes are. In this respect it is different from the Commerce Department's Uniform Product Liability Act and other prior bills that have been kicking around in the Congress for the last couple of years. The text of the bill gives us no clues as to exactly what problems it is trying to solve.

Now, Mr. Chairman, in your Congressional Record statement of June 16 introducing the bill, you referred to two of the key reasons identified by the Federal Interagency Task Force as contributing to what I refer to as the so-called product liability crisis of the mid-1970's. And on that point, by the way, I would ask permission to submit for the record a very brief article which I recently wrote in the Nation Magazine giving a slightly different, dissenting view, as it were, of the product liability crisis.

Senator **Kasten**. Without objection, that will be made a part of the record.

Mr. **Page**. The two causes that you cited were overly subjective product liability rate insurance ratemaking and uncertainties in tort liability rules in the various States. But unfortunately you did not mention what the task force found as the third coequal cause of the product liability crisis, and that is the manufacture and sale of unsafe products. Any Federal product liability bill has to have as one of its major purposes the purpose of getting these kinds of products off the market or forcing redesign of unsafe products that are injuring and killing people.

This is an undisputed fact. People out there are getting hurt and are getting killed by unsafe products.

Now, I am going to proceed on the assumption that the bill means to address all three of the major problems spelled out by the committee and comment generally on them.

With respect to overly subjective product liability insurance ratemaking, it has been suggested that the Risk Retention Act, which I personally supported, solves that problem. It does not solve the problem it deals with, and it was not meant to solve the problem. It was meant to deal with one very small part of the problem. It was a tiny step down the road toward solving the problem of overly subjective product liability insurance. Ratemaking remains untouched.

Now, one extreme way to deal with that problem which I do not expect to happen is greater Federal regulation of the insurance industry. On the other hand, if you want to try to deal a little bit with that problem in a Federal product liability bill, you could include within that bill the product liability insurance carrier reporting requirements that have been enacted into law in at least two States, Georgia and Missouri, which compel insurers to report annually the number of product liability claims, amounts paid in settlement of claims, the amount of premiums collected, and other relevant information.

With respect to the problem of uncertainties, this bill is going to create a whole new class of uncertainties. Many of the provisions are vague, and will require statutory construction by the Court. Is the U.S. Supreme Court going to settle these matters finally?

I guess I will have to just make one brief final point with respect to something that you, Mr. Chairman, mentioned in your Congressional Record statement, and something that was touched upon by Professor Henderson. That is the notion that the current system gives too much to the lawyers, too much of the insurance premiums are going to the lawyers, and there is too much litigation.

Unfortunately, in my judgment, this bill is not going to solve that. There are still going to be cases. You are still going to need lawyers. The money is still going to be diverted into lawyers' fees. This bill is going to create a whole new breed of problems which I spell out in my written testimony, problems of statutory construction, problems of filling in the gaps, and it is going to create a whole new class of litigation.

Perhaps it is also going to create a flourishing of U.S. Supreme Court practice here in Washington, a product liability practice, which I look forward to, being a professor at Georgetown, but I do not think that is really what we want to do with this bill. So, I think that these things ought to be carefully considered before you go any further with this.

Thank you very much.

[The statement follows:]

STATEMENT OF PROF. JOSEPH A. PAGE, GEORGETOWN UNIVERSITY LAW CENTER

I urge this distinguished Subcommittee to reconsider S. 2631. As it presently stands, the bill is unworkable and undesirable. It needs much more study and a major redraft.

My major criticism of the bill is that it fails to serve any legitimate purpose which could be assigned to it. But before I elaborate upon this point, I cannot restrain myself from observing that S. 2631 violates a fundamental philosophy of President Ronald Reagan, who told us in his Inaugural Address that "It is my intention . . . to demand recognition of the distinction between the powers granted to the Federal Government and those reserved to the states or to the people." The bill under consideration is "galloping federalism," the likes of which have not been seen since the halcyon days of the New Deal. How the President could sign into law this massive federalization of an area of the law traditionally reserved to the states and at the same time remain faithful to his oft-stated commitment to "get the federal government off our backs" escapes me.

S. 2631 fails to spell out its purposes. Unlike the Commerce Department's Uniform Product Liability Act (UPLA), the bill before us gives no clues as to what problems it purports to cure.

Senator Kasten, in his Congressional Record statement of June 16 introducing the bill, refers to two key reasons identified by a federal interagency task force as contributing to the so-called "product liability crisis" of the mid-1970s: (1) overly subjective product liability insurance ratemaking and (2) uncertainties in tort liability rules in the various states. From the cnsumer perspective, it is disturbing that the Senator failed to mention the third, co-equal cause identified by the task force: the manufacture and sale of unsafe products. This was probably an inadvertent oversight: Any product liability bill which does not address this serious problem—the undisputed fact that unsafe products are injuring and killing people—merits out-of-hand rejection.

Therefore, I shall proceed on the assumption that S. 2631 means to address all three of the problems spelled out by the task force and explain why it falls short of providing acceptable solutions. First, I shall make some general comments on each of the problems, and then I shall point to difficulties created by specific sections of the bill.

A. The bill ignores the factor of overly subjective product liability insurance ratemaking. The Risk Retention Act, which I supported, does not pretend to be any more than a modest effort to deal with one small part of the insurance problem. (By the way, let me remind you that some insurance lobbyists opposed the Act on the ground that no product liability "crisis" existed.) The rest of the problem remains untouched. Federal requlation of the product liability insurance industry would be one answer but it runs afoul of President Reagan's aversion to extensions of federal authority (which no doubt would be taken very seriously on this point). If S. 2631 was really meant to be balanced, it would adopt the product liability insurance carrier reporting requirements enacted into law in at least two states (Georgia and Missouri), compelling insurers to report annually the number of product liability claims, amounts paid in settlement of claims, the amount of premiums collected and other relevant in formation.

B. S. 2631 will create a whole new class of uncertainties. Many of its provisions are vague and will need to be interpreted judicially; unless the U.S. Supreme Court settles these issues (which is quite unlikely), we could have conflicting interpretations by all 50 states *and* the 12 U.S. Courts of Appeals, which will be deciding product liability cases which get into the federal courts on the basis of diversity-of-citizenship jurisdiction.

In addition, the bill leaves gaps which will have to be filled by the courts. The courts will then have to decide whether to fill these gaps by resorting to state law or by creating a new federal common law. Either way, confusion and conflict will result. Two examples: (1) What law of damages and wrongful death will apply? (2) Though the bill touches upon punitive damages, it does not say which of the two different rules currently employed by the states to determine the liability of a corporation for punitive damages for the torts of an employee should apply: the rule which requires complicity by upper-level management, or the rule which imputes to the corporation the misconduct of any employee.

C. What is there in S. 2631 that will improve product safety? Though supposedly balanced, the bill in reality tilts markedly in favor of manufacturers, sellers and insurers. This will reduce their potential liability and thereby reduce their incentives to spend money on injury and disease prevention.

Now let me point to some specific provisions of S. 2631 and indicate how they frustrate what should be the underlying purposes of the bill.

1. The definition of "harm" in Sec. 2(5) may exclude serious emotional or psychic harm. Compare with Sec. 102(F) of the UPLA.
2. The preemption clause in Sec. 3(a) is ambiguous. It might exclude negligence actions against product certifiers and testers.
3. The preemption clause of Sec. 3(c) is very vague and does not instruct courts how they are to decide issues arising in product liability actions and not covered by the Act.
4. Sec. 4(a)(3) requires claimants to establish "proximate cause" without defining the term. State law on proximate cause is hopelessly confused and conflicting. Are the courts to apply state law to determine "proximate cause," or must they develop a new federal law of "proximate cause"?
5. Sec. 4(c) appears to overrule the famous *Sindell* case and make it very difficult, if not impossible, for claimants injured by a drug ingested in the past to recover against the manufacturers of the drug.
6. Under Sec. 5(b)(1) a product is not unreasonably dangerous in design unless the manufacturer knew or, "based on knowledge which had sound support in the scientific, technical, or medical community for the existence of the danger which caused claimant's harm, should have known" of the danger. Why the requirement of "sound" support? If there is *any* scientific or medical support for suspicion of a terrible danger which might cause extensive, serious harm, might not a court conclude that a prudent manufacturer ought to have engaged in further testing? Why remove the incentive for further testing under these circumstances?
7. The exemption from liability for "unavoidably dangerous" products in Sec. 5(c) prevents courts from deciding that a product is so dangerous that it never ought to have been sold. Compare with Sec. 106(B)(1), UPLA. What purpose is served by granting tort immunity to manufacturers of "dum-dum" bullets for sale to the public?

8. From the language of Sec. 6(c), it is arguable that a manufacturer who reasonably sold a product with a known danger would have no duty to inform consumers of postmanufacture technological advances of which the consumer could take advantage to eliminate the danger. Should not manufacturers have a duty of reasonable care to make reasonable efforts to make such information known to consumers?

9. The second alternative of Sec. 12, dealing with time limitations on liability, requires claimants to rebut by clear and convincing evidence the presumption that harm sustained ten years after the sale of a product was not caused by any unreasonably dangerous aspect of the product. Why "clear and convincing evidence" and not a "preponderance of the evidence"?

10. Sec. 13 limits claimants' rights to recover punitive damages. Punitive damages are not insurable and hence contribute in no way to the difficulty in setting product liability premium rates. What is the case for promoting certainty in punitive-damages rules?

Admittedly, S. 2631 could have been much worse for potential product victims. One need only study prior drafts of the bill and other bills instigated by special interest groups, and to listen to testimony at these hearings.

Nonetheless, it should be carefully rethought and reworked. To do otherwise is to solve little and create all kinds of new problems.

Attachment.

[From the Nation, May 3, 1980]

CAVEAT INSURERS

(By Joseph A. Page)

In the mid-1970s, the business community rent the air with anguished cries about sharply rising premiums for product liability insurance. The costs of insurance against claims for injuries caused by defective products had risen between 100 and 1,000 percent in 1975, depending on the company, industry spokesmen complained. They laid all the blame on the increase in the number of product liability claims (one million in 1976 was the figure commonly given), huge awards to claimants and courts that found manufacturers liable on the slightest pretext.

Industry's favorite horror story was about the man who won a huge jury verdict for a finger he lost while using his power lawn mower to trim a hedge. There were predictions of a rash of bankruptcies; product innovation would decline. Business-page pundits grumbled about the litigation happy public.

As a result of the "crisis," a series of Congressional hearings were held and an interagency task force operating out of the U.S. Commerce Department was set up to probe the arcane system of insurance rate-making. The investigators' main discovery was that premiums had indeed skyrocketed. Beyond that, there were few facts to support business's panic. Instead of one million claims in 1976, the task force discovered, there had been only 60,000 to 70,000. An insurance industry study covering an eight-month period from 1976 through 1977 that was submitted to a Congressional committee put the average payment on product liability awards after trial or in out-of-court settlements at only $3,592 per claim. Companies had won about half the cases that went to trial before the crisis, and this success rate appeared to be holding. As for the digit-amputating lawn mower—pure fiction, as far as the task force could discover. It did unearth a different sort of horror story, however. A tiny company that sold fishbait (worms, grasshoppers, etc.) had been abruptly informed that its premiums were being raised from $52 to $248. The firm had been in business since 1902, and not a single product liability claim had ever been filed against it.

Analysis of the insurance industry's rate-making practices failed to uncover any rational, factual basis for the skyward surge of product liability premiums. "Panic pricing" was the only explanation the task force could come up with to describe the conduct of some insurers. The fact that the increase in premiums followed hard on the heels of a stockmarket dip that cut heavily into the companies' investment reserves raised suspicions that the origin of the product liability crisis might have had little to do with any upsurge in claims. It may be only coincidental, but an earlier, identical medical malpractice insurance crisis was also preceded by a decline in the market.

While the facts uncovered by the Commerce Department study remain little known, businesses continue to exploit the inflated crisis. In state after state, industry-sponsored bills restricting the individual's right to recover damages for harm caused by defective products have sailed through the legislatures with little consideration of the possibility that reduced liability could remove manufacturers' incentive to make safe products, or of whether the laws will actually reduce insurance costs.

On the Federal level, Congress has thus far moved cautiously. Out of concern for small businesses that have been caught in the cost crunch, the House of Representatives recently passed the risk-retention act, which permits companies to form their own interstate product liability insurance groups. These are expected to provide them with coverage at lower rates than those offered by commercial insurers. (Not enamored of competition from this quarter, insurance lobbyists opposed the bill—arguing that there was no product liability crisis after all!)

This week, hearings began in Congress on two proposals for a uniform Federal product liability act. One of them was drafted by the Commerce Department task force and makes a bona fide effort to balance the interests of producers and victims of defective products. The other is a lopsidedly pro-business package being put forward by a national group of manufacturers who hope to duplicate in Washington the successes industry has enjoyed in the state legislatures.

Neither bill has any chance of passage during the current session. Those who are promoting the anticonsumer bill will find a more skeptical audience on Capitol Hill, thanks to the work of the task force, and will encounter the sort of organized resistance that was absent in the states. The Commerce Department draft has not yet generated much support.

Nonetheless, the hearings could throw more light on the true nature of the Great Product Liability Crisis. If it turns out that it was brought on by panic behavior (or worse) on the part of insurers, Congress might even be persuaded to think the unthinkable, and consider whether to pull product liability insurance companies out from under the protection of the 1945 McCarran-Ferguson Act, which exempts the insurance industry from Federal regulation.

Senator KASTEN. Professor Page, I cannot tell exactly where you stand on the overall issue. Are you opposed to Federal tort reform legislation per se?

Mr. PAGE. No.

Senator KASTEN. Do you support State-by-State tort reform, such as has taken place now in 32 or 33 States? As you know, the trial lawyers testified before this committee saying "tort law reform can best be carried out at the State level" and before state legislatures saying that it can best be carried out at the Federal level.

Mr. PAGE. I do not know what you mean by tort law reform at the state level. For example, the product liability bill?

Senator KASTEN. Yes.

Mr. PAGE. No, that is not reform. That is reaction. Those bills are usually quite abominable. Your bill will cure some of the problems that are created by those bills.

The problem here is balance. For example, your bill is great for people in Oklahoma who have been injured by willful and wanton misconduct of a manufacturer, because under the product liability law of Oklahoma you cannot get punitive damages in product liability cases. Your bill, the Federal bill, would permit that. So, it is great for potential punitive damage product liability claimants in Oklahoma.

That is a plus, but you have to balance the pluses and minuses.

Senator KASTEN. You agree, though, as you suggested in your statement and in your last answer that there is at the present time a great deal of confusion and uncertainty due to the conflicting law from State to State.

What we are trying to do is to stabilize this area of the law and make it predictable. Are you suggesting either that uncertainty is good, or that even with this bill we will continue to have a certain amount of uncertainty?

Mr. **Page**. Yes. Well, the last point that you mentioned is the point I was trying to make, that you are still going to have many, many uncertainties with your bill. We have to ask, why is uncertainty bad? One of the reasons that has been advanced is that product liability insurance carriers have a great deal of difficulty setting their rates because of uncertainty. Then, why tinker, for example, with punitive damages in the Federal bill, because punitive damages are not insurable? They are not covered by product liability insurance.

So, I am not sure that stabilizing the law of punitive damages is going to be helpful to serve that particular purpose.

Senator **Kasten**. It is not our desire to establish certainty for purposes of predicting ratemaking. It is our desire to establish certainty for product sellers, manufacturers, and others. The problems of the insurance market are a result of the uncertainty and unpredictability in terms of the costs that are levied in these various court settlements. Our purpose is not to solve the insurance problems, that is only an indirect result.

Mr. Henderson, could you comment on that same question? If we assume that there is a certain amount of uncertainty and lack of predictability at the present time either with no law in a State or with conflicting State laws, does this bill help to establish a certain amount of uniformity and predictability?

Mr. **Henderson**. I believe that it does. You have to understand that when we speak of uncertainty, we may be speaking about uncertainty as to what the legal standards are. There is another kind of uncertainty, and it is the uncertainty that given a set of factual circumstances, no one can predict whether liability will follow or not. It resembles a lottery. The vagueness of the rules in many States lead to any result based on the cleverness and skills of the lawyers.

I think that what this bill would do is to, in the important areas of design and warning, establish uniform, fairly clear, fairly specific manageable, workable standards, and whether in its sweep it may go too far is a question you will want to address as you go.

It may be that down the road some parts of this will have to give way. I do not have sufficient wisdom or political experience to predict, but I do know based on my long experience studying these matters that something has to be done to supply clear enough standards so that liability can be imposed where it is justified, and the manufacturers can know what it is they are to meet in the way of an obligation to the public.

I do not think that is happening today. It is a billion- multibillion-dollar lottery, very little of which gets returned to consumers—race tracks pay about 80 percent of the take. This thing on any view is just a system gone wild, and I do think this bill, though it is not perfect, is far and away the best thing I have seen.

Senator **Kasten**. Do you feel, Professor Henderson, that the design defect and failure to warn sections have been improved since the Uniform Product Liability Act was published? Since you say that S. 2631 is not perfect, how would you like to see these sections improved?

Mr. **Henderson**. When I say it is not perfect, you might invite me to get into the detail of it. I think it could be tightened and shortened somewhat. I think the unavoidably dangerous business probably is taken care of by the obligation of a fault standard on the manufacturers. I think that it is an improvement.

The very first measure that I reviewed, was asked to review, suggested a standard of reasonableness with a series of factors that left me, and I know it would leave lawyers and manufacturers and anybody involved, in limbo as to how a particular case would come out.

It is my heartfelt view that this bill, were it enacted into law, and I am thinking of sections 4, 5, and 6, mainly, would not eliminate all uncertainty. A measure of that is healthy in a system, but it would bring things down to the point that you could predict in the clear cases as I honestly do not think it is possible to do today. You pays your money and you takes your chances is pretty much the way it goes, and the fellows who are running the game are taking about 65 percent of what is at stake.

Senator **KASTEN**. Professor Henderson, you have reviewed the staff drafts and I believe you testified at one of our previous hearings.

Mr. **HENDERSON**. I did.

Senator **KASTEN**. One section we have left out of this bill that was in the previous bill, and it was left out because there was significant opposition to it from trial lawyers and consumer groups and others, is the section on Government standards.

How important do you feel the Government standards and Government contract provisions—as we had in staff draft No. 2 are to a uniform product liability bill?

Mr. **HENDERSON**. I have been privy to many conversations with many people on both sides of this question, and speaking for myself, I am here really as an academic today, taking, I hope, a balanced view. I viewed the elimination of that section with a measure of relief. I saw it as such a difficult area to try to develop, to hit that nice balance. It was just very hard.

So, to the extent that that shortens and simplifies the bill, though it is not without some costs, I approved that change from the last draft to this.

Senator **KASTEN**. Professor Henderson, Professor Page, thank you very much. Once more, there may be additional questions from the subcommittee. We will submit those questions to you in writing. We thank you both for your testimony today.

Our next panel will include Mr. Ford, Mr. Goetz, and Mr. Greenberg. Our first participant in this panel will be Mr. William Ford, who is with the Coalition for Uniform Product Liability Law, and is also the general counsel for Colt Industries. Mr. Ford.

STATEMENTS OF WILLIAM D. FORD, COALITION FOR UNIFORM PRODUCT LIABILITY LAW, AND GENERAL COUNSEL, COLT INDUSTRIES, INC., ACCOMPANIED BY WILLIAM A. FORREST, JR., GENERAL COUNSEL, A. H. ROBINS CO., INC.; HERBERT W. GOETZ, MANAGER, PRODUCT SAFETY, CINCINNATI, INC., ACCOMPANIED BY WENDELL LUND, LEGISLATIVE COUNSEL, NATIONAL PRODUCT LIABILITY COUNCIL; AND DAVID I. GREENBERG, LEGISLATIVE DIRECTOR, CONSUMER FEDERATION OF AMERICA

Mr. FORD. On behalf of the Coalition for Uniform Product Liability Law, an ad hoc coalition of over 100 manufacturers, we are delighted to be here to express our views on S. 2631 and the need to resolve the product liability difficulties that have been plaguing American business, especially small business, for the last several years.

It is encouraging that the subcommittee has, by proceeding with these hearings, determined that a Federal solution to product liability problems is necessary. We share the subcommittee's belief that Federal legislation offers the only feasible means of addressing these problems, and are grateful for the subcommittee's legislative initiatives.

The working drafts and S. 2631 represent an excellent starting point for these hearings.

At the subcommittee's request, I will confine the bulk of my oral remarks to section 12, the statute of repose. We are encouraged that the subcommittee recognizes that the unlimited time during which manufacturers may be held liable for harms caused by their products is a substantial problem in need of correction.

To address this difficulty, section 12 of S. 2631 provides two alternative methods for treating the repose issues. While we believe that these are commendable attempts to grapple with difficult issues, we do not believe that they strike the necessary balance between the competing interest involved.

On the one hand, society has a very real interest in maintaining a product liability system which provides for manageable risk. Any regime which limits neither the amount of recoveries nor the duration over which these recoveries may be sought will ultimately prove unmanageable and ought to be avoided. As S. 2631 and prior drafts contemplate the continuation of a fault-based system which permits open-ended liability for noneconomic loss, the only means by which manageable risk can be obtained is through a limitation on the duration of exposure to liability.

Let me take a moment to expand upon this concept of manageable risk. A manufacturer who places in commerce a product believed to be safe can, were it soon thereafter to discover that the product is defective, take steps to insure that future harms will be minimized. It can do this through recalls, retrofittings, public notices, and so forth.

While the manufacturer might sustain financial hardships for liability arising out of injuries occurring prior to its ameliorative action, generally the manufacturer's liability for harm will be manageable and often insured. But where, because of the latent manifestation of injury, a manufacturer has marketed a product over a great many years before its injury-causing properties become known, the potential liability can be disastrous, and an unmanageable risk results. One need only consider the numerous current situations clogging the courts involving products such as DES, formaldehyde, agent orange, IUD's, and asbestos.

In the case of asbestos-related diseases, over 16,000 suits have been filed, and unknown numbers of future product liability claims may be made. One Yale University economist has estimated that the cost of these claims may range from $38 billion to as much as $90 billion.

Not only is the continued existence of some manufacturers of asbestos products threatened, but a number have received qualified opinions from their auditors because of their potential exposure. Some experts have questioned whether the American property casualty insurance industry can withstand the magnitude of the claims expected to result.

And there are countless more time bombs ticking away at this moment. Some we know about—DES, formaldehyde, agent orange. Some may result in problems downstream, and some we cannot even begin to guess—products that now we assume are safe which years from now we will find resulted in dread diseases.

Any of these risks may potentially produce liability, which devastates not only individual companies but entire industries, and which could have serious repercussions throughout society as wage earners, creditors, and stockholders are ultimately affected. Conceivably, the property casualty insurance community could be imperiled.

If the manageability of risk were the only concern, fashioning a solution would be easy, but of course there is another side, the justifiable concern that injured persons should not be foreclosed prior to the time of their traumatic injury or their awareness of their nontraumatic injury from the opportunity to seek redress for their harms.

These two interests are irreconcilable. The more one is accommodated, the more the other suffers. Thus, it is important to recognize that the solution ultimately fashioned necessarily requires a balancing of these concerns.

We suggest that the first alternative should be modified to provide for a 10-year statute of repose applicable to all products in all product liability actions. However, where injury does not manifest itself until 10 years, or in cases of fraud, a 15- or 20-year repose period should apply.

We believe that with these changes we are recommending, the first alternative would strike a more appropriate balance between the competing interests.

It is noteworthy that 11 of the 22 States that have adopted statutes of repose have determined to employ an approach similar to that which we are urging—to permit liability to be assessed only for a period of certain duration.

There are also additional policy considerations suggesting the implementation of our recommendations would be appropriate. The institutional problem of courts attempting to deal with stale matters would be alleviated, since the production of evidence becomes impaired by the passage of time. Moreover, making assessments as to the reasonableness of conduct that occurred 25 years ago is an extremely difficult task, even when witnesses are available. A 10-year repose period with a limited exception of, say, 15 years for delayed manifestation or fraud, would be more consistent with this concern.

Finally, it should be noted that the concept of risk management through limitation on the fault system is not new, but has statutory precedent in, for example, the Price-Anderson Act.

I would also like to mention briefly other aspects of S. 2631, detailed in our prepared remarks, which we would commend to your attention. These matters, to which we attach high importance, include the need to limit punitive damages, to address the relevance of compliance with Government standards and contract specifications, and to legislatively repeal the holding in *Sindell.*

[The statement follows:]

STATEMENT OF WILLIAM D. FORD, CHAIRMAN, EXECUTIVE COMMITTEE, COALITION FOR UNIFORM PRODUCT LIABILITY LAW

INTRODUCTION

On behalf of the Coalition for Uniform Product Liability Law, we are delighted to be here to express our views of S. 2631, and the need to resolve the product liability difficulties that have been plaguing American business, especially small business, for the last several years.

It is encouraging that this Subcommittee has, by proceeding with these hearings, determined that a federal solution to product liability problems is necessary. We share the Subcommittee's belief that federal legislation offers the only feasible means of addressing these problems,[1] and are grateful for the Subcommittee's legislative initiatives: The Working Drafts and S. 2631 represent an excellent starting point for these hearings.

Before proceeding with our comments, it would be appropriate to explain briefly the membership and goals of the Coalition for Uniform Product Liability Law. Essentially, we are an ad hoc coalition of over 100 manufacturers who are seeking the adoption of effective and sound product liability tort legislation. Appendix B to my prepared statement provides a complete list of our members.

STATUTE OF REPOSE

At the Subcommittee's request, I will confine the bulk of my oral remarks to Section 12, the statute of repose. However, Appendix C to my prepared remarks contains our specific comments with respect to each other provision in the bill.

We are encouraged that the Subcommittee recognizes that the unlimited time during which manufacturers may be held liable for harms caused by their products is a substantial problem in need of correction. To address this difficulty, Section 12 of S. 2631 provides two alternative methods for treating the repose issue. We assume that the authors of S. 2631 did not intend that both methods be adopted; rather, they presented two alternatives to facilitate consideration of this most important issue.

The first method provides that, in the case of "capital goods", no product liability action for design defects or failure to warn defects shall be commenced more than 25 years after the date of first delivery of a product to a person who will not resell it. This period of limitation, however, does not apply if the harm was caused by the cumulative effect of prolonged exposure to a defective product; if the harm, caused within the 25-year period, did not manifest itself until the expiration of that period; or if the harm was caused by intentional misrepresentations or fraudulent concealments. "Capital goods" are defined to be depreciable property (other than motor vehicles) used in a trade or business; held for the production of income; or sold, leased or donated to a governmental or private entity for training, for demonstration, or for similar purposes. Products other than "capital goods" are not covered by this alternative.

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[1] Appendix A contains a brief exposition of the general need for federal product liability legislation.

The second method adopts a somewhat different approach, and applies to all products. Essentially, after 10 years from the time that a product was first delivered to a person who did not resell it, the product is presumed to be free from design defects or failure to warn defects.[2] However, the presumption may be rebutted by clear and convincing evidence to the contrary. Also, the presumption does not apply in cases of prolonged exposure, delayed manifestation of harm, or intentional misrepresentation or fraud.

While we believe that these are commendable attempts to grapple with difficult issues, we do not believe that they strike the necessary balance between the competing interests involved.

On the one hand, society has a very real interest in maintaining a product liability system which provides for "manageable risk." Any regime which limits neither the amount of recoveries nor the duration over which these recoveries may be sought will ultimately prove unmanageable and ought to be avoided. As S. 2631 and prior staff drafts contemplate the continuation of a fault-based system which permits open-ended liability for non-economic loss, the only means by which manageable risk can be obtained is through a limitation on the duration of exposure to liability.

Let me take a moment to expand upon this concept of "manageable risk."

A manufacturer who places in commerce a product believed to be safe, can, were if soon thereafter to discover that the product is defective, take steps to assure that future harms will be minimized. It can do this through recalls, retrofittings, public notices, and so forth. While the manufacturer might sustain financial hardships for liability arising out of injuries occurring prior to it ameliorative action, generally the manufacturer's liability for harm will be manageable and often insured. In most cases, the business will be able to "weather the storm".

But where, because of the latent nature of the injury, a manufacturer has marketed a product over a great many years before its injury-causing properties became known, the potential liability can be disastrous, and an unmanageable risk results. One need only consider the numerous current situations clogging the courts, involving products such as DES, formaldehyde, agent orange and asbestos.

In the case of asbestos-related disease, over 16,000 suits have been filed and unknown numbers of future product liability claims may be made. One Yale University economist has estimated that the cost of these claims may range from $38.2 billion to as much as $90 billion.

Not only is the continued existence of manufacturers of asbestos products threatened—many have received qualified opinions from their auditors because of their potential exposure—but some experts have questioned whether the American property/casualty insurance industry can withstand the magnitude of claims expected to result.

And there are countless more time bombs ticking away at this very moment. Some we know about—DES, formaldehyde, agent orange; some we suspect may result in problems downstream—nitrites, cyclamates, tampons; and some we could not even begin to guess—products that we now assume are safe, which years from now will be found to result in dread diseases.

Any of these risks may potentially produce liability which devastates not only individual companies, but entire industries, and could have serious repercussions throughout society as wage-earners, creditors and stockholders are ultimately affected. Conceivably, the property-casualty insurance community could be imperiled—if it isn't already through its exposure in the asbestos cases.

If the manageability of risk were the only concern, fashioning a solution would be easy. But of course, there is another side—the justifiable concern that injured persons should not be foreclosed, prior to the time of their traumatic injury or their awareness of their nontraumatic injury, from the opportunity to seek redress for their harms.

These two interests are irreconcilable: The more that one is accommodated, the more the other suffers. Thus, it is important to recognize that the solution ultimately fashioned necessarily requires a balancing of these concerns.

With these thoughts in mind, consider the second alternative in S. 2631—the 10-year presumption. Increasing the quantum of proof required does nothing to aid the manageability of risk, as it continues the potential for unlimited liability over an unlimited duration. As a result, we believe the second alternative is an entirely unsatisfactory approach.

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[2] In the event that the manufacturer warrants that the product could be safely utilized for a period longer than 10 years, the presumption applies only after the expiration of such longer period.

The first alternative—the 25-year statute of response—is a move in the right direction because it implicitly recognizes that risk manageability is a problem. Nevertheless, as presently drafted, this alternative only marginally mitigates this difficulty.

Because its application is limited to capital goods (and only in actions for design defects or failure to warn defects), this alternative is ignoring a major portion of all products where risk manageability is an acute concern. Moreover, the 25-year period is too long, and the exceptions for latent defects, cumulative exposures, and misrepresentation and fraud are so broad as to vitiate most of the improvements that would otherwise be realized.

We suggest that the first alternative should be modified by having it apply to all products in all product liability actions; by making the 25-year period 10 years; and by curtailing the application of the exceptions, which now provide open-ended liability in perpetuity, to a more reasonable duration—say 15 to 20 years.

We believe that with the changes we are recommending, the first alternative would strike a more appropriate balance between the competing interests.

It is noteworthy that 11 of the 22 states which have adopted statutes of repose have determined to employ an approach similar to that which we are urging—to permit liability to be assessed only for a time certain.[3] Additionally, these 22 state statutes provide periods of repose ranging from 5 to 12 years—periods substantially shorter than the 25-year period in S. 2631.

Were the first alternative enacted in its present form, product sellers may be worse off in these states than they are under current law.

Apart from striking a better balance between the competing interests previously discussed, and apart from its similarity to the statutes of 11 states, there are also two additional policy considerations suggesting that implementation of our recommendations would be appropriate.

First, it would greatly facilitate evidentiary problems that would otherwise result.

Under S. 2631, a manufacturer may be liable for design defects, or for failure to warn or instruct, only if negligent at the time a product was manufactured. Thus, the terms of the Act explicitly require that the appropriateness of a manufacturer's conduct be determined at the time of manufacture.

Making assessments as to the reasonableness of conduct that occurred 25 years ago is an extremely difficult task, even where all witnesses are available. Who among us can remember the details of decisions that we made 25 years ago? When this task is complicated by the inevitable deaths, retirements and job changes of those who were employed at the time the decisions were made, the burdens of making such determinations can be seen to be enormous.

The policy concerns underlying the need for statutes of limitations are instructive in considering these evidentiary difficulties. As one commentator has explained, "the basic principle most generally relied on" for statutes of limitation are "to suppress fraudulent and stale claims from springing up at great distances of time and surprising the parties or their representatives when all the proper vouchers and evidences are lost or the facts have become obscure from the lapse of time or the defective memory or death, or removal of witnesses."[4]

Claims that could be asserted for up to 25 years after a product was made (or longer if any of the exceptions are applicable) would appear susceptible of all the evils that statutes of limitations are designed to avoid. A 10-year repose period (with a limited exception for fraud or delayed manifestation of harm) would be more consistent with these concerns.

Equitable considerations also suggest the appropriateness of our suggestions. In virtually all of the types of cases where the risk is proving unmanageable, the manufacturers did not know when the products were first made of their true potential for harm. Neither the price charged for such products, nor the product liability premiums, reflected what is later learned to be the true costs. Moreover, society enjoyed the advantages of having these products available at prices not reflecting their true costs which only later became known. As a result, we do not believe that it is fair for the manufacturers alone to shoulder the entire responsibility for these harms. A 10-year repose period with a limited exception for delayed manifestation strikes a reasonable accommodation between these interests.

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[3] The remaining 11 statutes provide (1) that the application of the repose period may be rebutted by appropriate evidence and/or (2) that the repose period does not apply in specified situations, such as those now found in the first alternative. A summary of these 22 statutes are included with my prepared remarks as Appendix D.

[4] 53 C.J.S. "Limitations of Actions," § 1.

We recognize that pregnant in our suggested approach is the question, "What is to be done for persons such as those whose mothers took DES?"

The answer to this question may be gained by considering a threshold policy determination implicitly underlying S. 2631 and each of the prior staff drafts: All of these bills provide for a fault-based system; [5] they do not provide for a compensation system.

S. 2631 provides no recovery where a claimant shows merely that he was injured; and it provides no recovery where a claimant shows merely that the product caused his injury. Under S. 2631, and in the majority of jurisdictions today, before any liability will ensue, a claimant must prove not only that the product caused his injury, but also that the product seller or manufacturer who made the product was at fault. Without fault, no matter how egregious the injury, there will be no compensation. And as a corollary of this, many injured persons are left uncompensated by the tort system.

But, the hardships caused by a fault-based system are, to an extent, mitigated by other social policies. For example, all persons covered by the Social Security System may be entitled to disability benefits and Medicare; and when persons are injured in the course of their employment, they may be entitled to worker compensation benefits.

We believe that most persons who ae injured after the expiration of the repose period we are urging would be uncompensated by the fault-system in any event: They would be unable to demonstrate fault even were they permitted to do so. However, their hardships would be mitigated to the extent that they receive the same social benefits as other uncompensated persons.

Finally, it should be noted that the concept of risk management through limitations on the fault-system is not new, but has statutory precedent. For example, the Price-Anderson Act limits liability of those responsible for a nuclear incident to $560 million.[6] Society bears the cost of loss to the extent that liability ensues above this amount.

The Price-Anderson Act manages risk by limiting the amount of recovery; our proposed amendments accomplish a similar result by limiting the duration over which recovery might be sought. But the net effect is the same: Greater predictability and certainty in the conduct of business endeavors where the full potential for liability is unknown and theoretically unlimited.

In fashioning a federal product liability law, Congress now has the opportunity to restore risk manageability, and hence greater certainty, to our nation's businesses: We believe that it would be imprudent to leave this aspect of the problem unaffected.

PUNITIVE DAMAGES

I would also like to comment briefly on S. 2631's treatment of punitive damages.

We strongly believe that S. 2631 should be amended to provide limitations on both the amount of punitive damages that may be awarded in a particular action and on the amount of punitive damages that can be awarded with respect to a particular product in the aggregate. Such limitations on punitive damages are appropriate as such damages in civil actions are similar to fines in criminal proceedings: The objectives underlying the allowance of punitive damages are to punish the malefactor for his conduct and to deter him and others similarly situated from engaging in such conduct in the future—both of which are also objectives of fines. Punitive damages are not compensatory, despite the fact that it is the claimant to whom these damages are awarded. Rather, they serve only societal purposes.

The allowance of punitive damages in mass product liability actions is uniquely susceptible to unfair results. Unlike other torts for which punitive damages might be awarded, product liability actions potentially involve literally thousands (and sometimes millions) of persons. Where a product is defectively designed or where appropriate warnings or instructions are not provided, every user of the product is a potential claimant. Manufacturers are thus subject to open-ended liability, not only for compensatory damages, but also for punitive damages. This open-ended liability for punitive damages is generally not insurable (i.e., not manageable). As a result, given the potential for multiple substantial awards, the continued existence of a manufacturer may be jeopardized whenever such damages are repeatedly sought.

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[5] The strict liability resulting from construction defects may be viewed as resulting from an irrebuttable presumption of negligence.

[6] 42 U.S.C.A. § 2210(e) (Supp. 1982).

Further, it is questionnable whether deterrence is a legitimate justification for punitive damages in product liability cases: The prospect of numerous suits, with potential verdicts in the hundreds of thousands, if not millions of dollars, already provides a sufficient disincentive for the manufacture of defective products.

It would appear that in view of the societal purposes—as distinguished from compensatory purposes—being served by permitting punitive damages, Congress should properly impose a limitation on the aggregate amount of punitive damages.

GOVERNMENT STANDARDS AND CONTRACTS

We were disappointed to see that the provisions regarding the relevance of government standards and contract specifications—which had been included in the first two staff drafts—had been deleted in S. 2631. We believe that these are important areas which should be addressed in any federal product liability bill.

Substantial efforts go into the development of government standards. It is unfair to permit jurors to reevaluate a manufacturer's conduct when that conduct has been prescribed by standards drafted by government experts, often after intense public scrutiny. Government standards provide a reference point that should be presumptively dispositive in determining the appropriateness of a manufacturer's conduct.

Similarly, compliance with government contract specifications potentially places a manufacturer in an untenable position. Where a manufacturer merely fabricates a product to conform with contract specifications drafted by a government entity, such manufacturer potentially may be found responsible for at least a portion of the harm caused by that product. However, as a result of sovereign immunity, such manufacturer often would have no recourse against the contracting government entity.

TREATMENT OF SINDELL DECISION

Finally, while we were delighted that the first two staff drafts would have legislatively overruled the *Sindell* decision, we were somewhat chagrined to find that S. 2631 not only made some accommodation to that decision, but that this accommodation would now be available nationwide.

We are concerned with both the uncertainty and the transaction costs that would be engendered by this provision.

While in many situations, the probability that a given claimant would be able to make the requisite showing is small, the possibility certainly exists. As the elimination of uncertainty is one of the principle objectives of this legislation, we believe that this provision to a substantial extent undermines that objective.

Moreover, we would expect substantial transaction costs to result from the multiplicity of parties that would necessarily be required as well as from the inevitable protracted contests over whether the claimant had met the proof required by Section 4(c).

As a result, we recommend that this new treatment of the *Sindell* decision be deleted, leaving merely the requirement that to establish liability, a claimant prove that the manufacturer made the product.

Mr. Chairman, this concludes my remarks. I would be pleased to answer any questions you may have.

APPENDIX A

THE NEED FOR FEDERAL ADOPTION OF PRODUCT LIABILITY TORT LEGISLATION

I. NATURE OF THE PRODUCT LIABILITY PROBLEM

The law of product liability has undergone profound changes over the last ten years.[1] By the mid-1970's, the problems created by these changes had become national in scope. The business community was facing increasing uncertainty and inequity with product liability laws. Further, many businesses, especially small businesses,[2] were experiencing increasing difficulty in obtaining or being able to afford product liability insurance.

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[1] R. Epstein, Modern Products Liability Law 3 (1980).

[2] The burden associated with the present confusion in product liability law is greatest for the smaller business. While the largest corporations may be able (at considerable cost to their investors and customers) to support a legal budget and legal staff sufficient to provide guidance through the product liability maze, the smaller business is less able to do so. Indeed, as William

Continued

As a result, President Ford convened an Interagency Task Force on Product Liability to study these problems. The Task Force's comprehensive Final Report,[3] issued in October 1977, confirmed that uncertainty and inequity in the product liability tort-litigation system were causing major problems in the product liability field. These problems included sharply rising costs in resolving product liability disputes, disincentives toward product innovation, and overly subjective insurance ratemaking practices.

These uncertainties and inequities are not surprising because product liability rules have been developed predominantly by judges articulating a variety of public policies from a multiplicity of perspectives without recourse to any uniform body of product liability law. Thus, businesses are confronted with a crazy-quilt of product liability rules, that are inconsistent from state to state, and constantly in flux.

A. UNCERTAINTIES

The Task Force described the uncertainty as follows:

"Among the primary areas of uncertainty in basic product liability laws are the rules relating to the responsibility of the manufacturer in designing his product and warning about hazards connected with that product. As a practical matter, there is no way a manufacturer can always know "in advance" whether he has designed his product properly or given proper warnings about hazards connected with the product. Also, in most situations there is no strict cut-off point where a manufacturer is no longer subject to liability for an injury caused by a product. Rules are also in flux in regard to the responsibility a product user should bear for his own misconduct."[4]

This uncertainty is compounded by the fact that, with continuing changes in the law and the hindsight perspective applied by juries, manufacturers can have no assurance that what is acceptable conduct today will be so held tomorrow.

This uncertainty is further compounded by problematic conflicts-of-law questions which, while not unique to product liability, are often underscored in product liability litigation. It is not uncommon for a manufacturer domiciled in one state to manufacture a product in a second state which causes injury in a third state to a person domiciled in a fourth state. Moreover, the test as to which state's law is applicable itself varies from state to state, with the result that potential anomalies may occur.

B. INEQUITIES

The difficulties caused by uncertainty are exacerbated by the inequities present in the product liability laws of some states which are moving from a fault-based tort system to a no-fault system with unlimited damages. In this regard, the Task Force stated:

"[T]here are cases which appear to approach a system of absolute liabilty. Some appellate courts do not view product liability law as a means of apportioning responsibility between parties, but as a compensation system. These courts come very close to holding that the tort-litigation system should provide a recovery for persons who prove that they were injured by a product, These courts believe that the defendant is in a better position to "distribute the cost of risk" than the plaintiff is to bear it."[5]

It is inequitable to require a faultless product manufacturer or seller to participate in a compensation system that no legislature ever created. It is similarly inequitable to subject product sellers to the case-by-case articulation of randomly defined standards of product design. The unfairness of inconsistent standards is noted in *Dawson* v. *Chrysler Corp.*,[6] where the Third Circuit Court of Appeals affirmed a jury finding that an automobile was defective in design because its frame was insufficiently rigid.

Unrebutted evidence at trial indicated that the less rigid frame actually offered greater safety and occupant protection in the most common types of collision situa-

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Rumble, President of G. F. Goodman & Son, testified on March 9, 1982, before the Senate Subcommittee on Consumer, Committee on Commerce, Science & Transportation, any such business may find its very existence endangered by even one suit of the sort that is commonplace today.

[3] Interagency Task Force on Product Liability, Final Report (1977). The Task Force was chaired by the Department of Commerce and drew its members from ten other governmental agencies. In addition, an Advisory Committee, with members representing consumers, manufacturers, product sellers, plaintiffs, the defense bar, and insurers, advised the Task Force throughout its fifteen month tenure.

[4] Final Report at I-23.

[5] Final Report at I-22.

[6] 620 F.2d 950 (3d Cir. 1980).

tions. No doubt, as the Third Circuit realized, were the manufacturer to design the frame otherwise, making it less resistant to crush in collisions, it would be found liable by another jury on another set of facts for designing an overly rigid vehicle. Thus, in affirming, the court did so with "uneasiness." stating:

"The result of such arrangement is that while the jury found Chrysler liable for not producing a rigid enough vehicular frame, a factfinder in another case might well hold the manufacturer liable for producing a frame that is too rigid. Yet, . . . in certain types of accidents . . . it is desirable to have a car designed [with a less rigid frame]. In effect, this permits individual juries applying varying laws in different jurisdictions to set nationwide automobile safety standards and to impose on automobile manufacturers conflicting requirements. It would be difficult for members of the industry to alter their design and production behavior in response to jury verdicts in such cases, because their response might well be at variance with what some other jury decides is a defective design. *Under these circumstances, the law imposes on the industry the responsibility of insuring vast numbers of persons involved in automobile accidents.*" [7]

C. CONSUMER EFFECTS

Consumers suffer no less than manufacturers and sellers when their legal rights are so subject to judicial whim. In addition, unclear and inconsistent standards may well impede rather than promote enhanced product safety. To the extent that manufacturers are discouraged from improving their products, consumer interests are ill-served. In some states, for example, evidence of post-manufacturer improvements in a product may be introduced in evidence to show that a product was defective. Such decisions have a chilling effect on the willingness of manufacturers to make their products safer by employing new knowledge and advances in technology.

And, of course, as the liability of product sellers becomes increasingly unpredictable and remote from notions of fault, the costs of products must increase—to enable product sellers to pay higher insurance premiums or to absorb the costs of self-insurance. Necessarily, these costs will be passed on to consumers in the form of higher prices. With each of the several parties in the product distribution chain typically facing virtually the same liability exposure, the cumulative impact of these costs passed on to consumers is compounded.

The establishment of stability and predictability will benefit consumers in promoting prompt compromise, and in eliminating bizarre variations in the compensation of injured consumers from court to court, and from state to state.

II. AN UNSUCCESSFUL EXPERIMENT WITH STATE LEGISLATION: THE MODEL UNIFORM PRODUCT LIABILITY ACT

In 1979, the United States Department of Commerce's Task Force on Product Liability and Accident Compensation authored a comprehensive model Uniform Product Liability Act ("UPLA"), for voluntary adoption at the state level.[8]

At the time that the UPLA was first promulgated, most commentators, including its drafters, agreed that it would be more appropriate for any model law on product liability to be adopted by the states rather than enacted by congress as federal law. The reasons for favoring this approach were twofold. First, it was believed that prior to consideration of any federal product liability tort legislation, it would be necessary to provide a mechanism to assure that any savings brought about by such legislation would be realized by product sellers rather than insurers. Second, and perhaps more important, since the development of tort law has been traditionally left to the states, it was thought that the states should be given time to adopt a uniform approach to product liability law on their own initiative.

Since the time UPLA was first proposed, the Product Liability Risk Retention Act has been signed into law.[9] This Act provides a mechanism—risk retention groups—whereby product sellers can collectively insure their product liability risks. These groups may be utilized when product sellers believe that the price of commercially available insurance is not commensurate with the risks for which insurance is sought.

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[7] Id. at 962 (emphasis added). The Court went on to note that "Congress is the body best suited to evaluate, and if appropriate, to change" this result. Id. at 963.

[8] 44 Fed Reg. 62714–50 (1979). The Task Force had proposed the drafting of a model law that could be implemented at the federal level or utilized by the states. 43 Fed. Reg. 14612, 14616–17, 14624 (1978). The Carter Administration directed the Task Force to draft a model law for voluntary adoption by the states. See 44 Fed Reg. 62714(1979).

[9] Pub. L. No. 97–45, 95 Stat. 949 (1981).

As to the second consideration, the attempt to achieve uniformity and consistency by having states adopt the UPLA has been singularly unsuccessful. Since 1979, only four states have adopted portions of the uniform law. While twenty-eight states have enacted some form of product liability legislation over the years (see Attachment A), each of these laws varies from the others in significant respects, none is comprehensive, and each touches on only a few of the many product liability issues that typically arise in litigation. More important, these statutes reflect a notable absence of uniformity in language and of consistency in approach. Manufacturers who sell nationwide are thus confronted with a myriad of often contradictory rules and standards from state to state—a situation that is no better, and arguably worse, than the common law that would otherwise apply.

III. THE CASE FOR FEDERAL LEGISLATION

In the absence of uniform legislation, there is little that any single state can do to remedy this situation. If state A were to reform its product liability tort laws, these changes would affect only the citizens of state A, and firms selling products to state A's citizens. Conflicts-of-law principles suggest that product sellers in state A who ship their products into other states likely would be unaffected. As a result, even if state A were to reform its laws, it would be unable to protect product sellers located within its borders.

It is noteworthy that many manufacturers ship the larger portion of their goods outside the state in which the goods are manufactured. Nationwide, individual states consume internally an average of only 30.5 percent of the goods manufactured within their borders. Attachment B provides a state-by-state breakdown of total goods manufactured, that portion consumed within the manufacturing state, and the percentage consumed within the maufacturing state.

Additionally, according to some commentators, it would be against the overall economic self-interest of any state to enact a law benefitting product sellers. Professor David Rice, presently Senior Research Fellow in Civil Liability at Yale Law School, believes that

"* * * given the existence of largely standardized products and prices, the nonuniform development of state law through judicial—and legislative—processes results in residents of some states subsidizing the economic benefits which the courts and legislators of other states afford their constituents through greater legal protection of their economic interests. *(And, parenthetically, provide an impetus for each state to want to be on the positive side of the 'free rider' calculus by not letting its liability law be any less favorable to consumers than that of any other significant state.)*" [10]

When these comments are considereed against the backdrop of expanding no-fault liability, Professor Rice indeed paints a frightening scenario for product sellers. It is thus apparent that not only are individual states impotent to solve a national problem, but it may be against economic self-interest for each to do so.

Professor Rice's theory has been borne out by the actions of some states. For example, in vetoing a state product liability bill, Kansas' Governor John Carlin stated:

"Current economic data indicate that approximately 90% of the prodcucts manufactured in Kansas are purchased out-of-state and a similar percentage of goods used by Kansans are manufactured in other areas. Consequently, unless a law is passed on Federal level, . . . only a small number of Kansas business owners could benefit from the special protections contained in the bill. Yet, all Kansas consumers would be subject to the limitations for recovery." [11]

Connecticut's Governor Grasso made a similar observation in vetoing a similar bill.[12] Thus, these governors consciously placed their states "on the positive side of the 'free rider' calculus."

Moreover, unlike automobile insurance (where rates are set along state lines), product liability insurance rates are set on a national basis.[13] Thus, any legislation adopted by a particular state would have little effect on that state's product liability insurance costs, even for product sellers making substantially all of their sales within that state.

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[10] E. Dauer, The Yale Law School Program in Civil Liability, Annual Report, Dec. 31, 1981, at 9 (emphasis added) (summarizing Professor Rice's research).

[11] Veto Message by Governor Carlin, April 24, 1980. Kansas subsequently adopted a product liability statute in 1981. Kans. Stat. Ann. Sec. 60-3301 et seq. (Supp. 1981).

[12] See Geisel, Connecticut Governor Vetoes Anti-Consumer Tort Reform, Business Insurance 1, 52 (June 26, 1978). Connecticut subsequently adopted a different statute than that vetoed. 1979 Conn. Acts 79-483.

[13] See U.S. Department of Commerce, Task Force on Product Liability and Accident Compensation, Report on Product Liability Insurance Ratemaking 11 (1980).

The difficulties of trying to secure a fifty-state-passed uniform product liability bill are obvious. It is no longer realistic, if it ever was, to expect that states can respond in an adequate way to product liability problems that are essentially nationwide.

CONCLUSION

With the promulgation of UPLA in 1979, many commentators believed that the states by considering uniform legislation, could resolve the problems of uncertainty and inconsistency. It is now clear, however, that the states have failed to adopt either comprehensive or uniform product liability statutes. It is evident that individual states cannot effectively address this nationwide problem.

Moreover, rather than abating, the product liability problem has grown even more pervasive and burdensome. The number of product liability claims has increased significantly. In just the last three years, the number of product liability claims brought in the federal courts has doubled.[14] In addition, verdicts and settlements in excess of one million dollars have become commonplace.

Many commentators believe that the tort system is reaching a breaking point. Balance and uniformity must be restored if the traditional tort system is to continue to provide a viable mechanism for dealing with product liability.

Federal action offers the only feasible means of addressing the present difficulties with the product liability system.

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[14] Business Insurance 1 (Oct. 12, 1981).

ATTACHMENT A—SUMMARY OF STATE PRODUCT LIABILITY TORT LEGISLATION

State	Liability for construction defects	Liability for other defects (including failure to warn)	Liability for product sellers other than manufacturers	Significance of Government standards and contract specifications	Significance of conduct of persons contributing to harm	Time during which product sellers may be liable	Post-manufacturing improvements	Punitive damages	Significance of workers compensation	Other
Alabama						X				X
Arizona	X				X	X	X			X
Arkansas			X	X	X	X				X
California										X
Colorado			X	X	X	X				X
Connecticut		X			X	X		X	X	X
Florida						X				
Georgia			X		X					X
Idaho			X		X	X				X
Illinois						X				X
Indiana	X				X	X				X
Kansas			X	X	X	X				X
Kentucky			X		X	X				
Maine	X	X								
Michigan				X	X	X				X
Minnesota					X	X		X		X
Nebraska			X		X	X	X			X
New Hampshire				X	X	X				X
New York										X
North Carolina			X		X	X				
North Dakota	X	X		X	X	X				X
Ohio										X
Oregon	X	X			X	X		X		
Rhode Island					X	X				
South Carolina	X	X								
South Dakota			X		X	X				
Tennessee			X	X	X	X				X
Utah					X	X				X
Washington	X	X	X	X	X	X				X
Total	7	6	11	8	21	22	2	3	1	20

ATTACHMENT B—PERCENTAGE OF MANUFACTURED GOODS CONSUMED IN MANUFACTURING STATE

[Dollars in millions]

State	Total manufacturing	Total consumed in State	Goods consumed in State (percent)
New England:			
Maine	$4,988	$824	16.5
New Hampshire	3,905	309	7.9
Vermont	1,989	186	9.5
Massachusetts	29,442	6,999	23.7
Rhode Island	5,294	772	14.6
Connecticut	19,229	3,822	19.9
Middle Atlantic:			
New York	85,615	25,876	30.2
New Jersey	51,168	10,470	20.4
Pennsylvania	78,339	19,780	25.2
East North Central:			
Ohio	94,460	26,598	28.2
Indiana	51,479	9,029	17.5
Illinois	92,153	26,097	28.3
Michigan	92,674	33,800	36.5
Wisconsin	38,556	9,869	25.6
West North Central:			
Minnesota	22,726	6,768	29.8
Iowa	23,396	2,941	12.6
Missouri	32,841	5,454	16.6
North Dakota	1,295	186	14.4
South Dakota	1,745	154	8.8
Nebraska	8,669	1,420	16.4
Kansas	15,894	2,551	16.1
South Atlantic:			
Delaware	5,191	318	6.1
Maryland	15,801	3,288	20.8
Virginia	23,763	5,560	23.4
West Virginia	8,650	1,150	13.3
North Carolina	40,813	12,264	30.0
South Carolina	18,873	4,577	24.3
Georgia	32,767	8,858	27.0
Florida	20,532	8,914	43.4
East South Central:			
Kentucky	22,829	5,170	22.6
Tennessee	28,408	6,338	22.3
Alabama	20,708	4,511	21.8
Mississippi	12,746	1,688	13.2
West South Central:			
Arkansas	12,163	2,062	17.0
Louisiana	29,339	11,350	38.7
Oklahoma	12,537	3,094	24.7
Texas	92,084	44,656	48.5
Mountain:			
Montana	2,781	1,494	53.7
Idaho	3,544	698	19.7
Wyoming	1,288	347	26.9
Colorado	9,958	2,601	26.1
New Mexico	2,011	974	48.9
Arizona	6,698	2,136	31.9
Utah	5,013	1,846	36.8
Nevada	936	133	14.2
Pacific:			
Washington	21,389	7,946	37.1
Oregon	14,313	5,005	35.0
California	118,166	66,770	56.5

ATTACHMENT B—PERCENTAGE OF MANUFACTURED GOODS CONSUMED IN MANUFACTURING STATE—Continued

[Dollars in millions]

State	Total manufacturing	Total consumed in State	Goods consumed in State (percent)
Alaska	1,090	438	40.2
Hawaii	1,943	1,051	54.1
Total	1,342,191	409,969	30.5

Firgues based on Commodity Transportation Survey, U.S. Department of Commerce, Bureau of the Census, Table 1, pages 1 through 77 (1977).

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[ATTACHMENT C]

Congress May Validly Enact a Federal Preemptive Product Liability Law

It is well settled that Congress has authority under the Commerce Clause [1] to enact laws determining the liability of parties for injuries arising out of commerce. Such laws may add, remove, or restrict defenses to liability; may limit liability; or may create or abolish causes of action.

Mondou v. *New York, New Haven & Hartford Railroad Co.,*[2] for example, involved a determination of the constitutionality of the Federal Employer's Liability Act, a federal law governing the liability of interstate railway carriers to their employees. The Supreme Court sustained the validity of the Act despite the fact that it altered the common law by removing the defense of the fellow servant rule, restricted the defenses of contributory negligence and assumption of risk, and expanded the carrier's liability to instances of death.

The *Mondou* principle was reaffirmed and in *Crowell* v. *Benson,*[3] which sustained the Longshoremen's and Harbor Workers' Compensation Act imposing liability without regard to fault; and later in *Indemnity Insurance Company of North America* v. *Pan American Airways,*[4] sustaining the Warsaw Convention, which limits liability of air carrier engaged in international travel.

While *Mondou* involved railway carriers that were operating in more than one state, other Supreme Court decisions clearly indicate that Congress' powers over commerce extend to intrastate activity "if [such activity] experts a substantial economic effect on interstate commerce . . . irrespective of whether such effect is . . . 'direct' or 'indirect'." [5]

Wickard v. *Filburn,*[6] which has been the law of the land for almost forty years indicates the extremes to which this power extends. In *Wickard,* it was determined that Congress could validly regulate the growing of wheat to be used solely for consumption on the farm, because such "[h]ome grown wheat . . . competes with wheat in commerce." [7] Thus, so long as intrastate activity affects interstate commerce, its regulation is within Congress' constitutional powers.

This proposition has been reaffirmed by the Supreme Court time and again in sustaining the application of federal laws enacted pursuant to Congress' Commerce Clause powers to activities ostensibly intrastate in character, but which also "affected" interstate commerce.[8]

It is difficult to conceive of a product which does not affect interstate commerce. Some products will be sold in interstate commerce; others will contain components or raw materials acquired in interstate commerce; and others will be substitutes competing with products made in interstate commerce.

Since Congress has the power to determine liability for injuries arising out of interstate commerce, and since virtually all products affect interstate commerce, it would seem clear that Congress is empowered to enact a federal product liability law.[9]

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[1] U.S. Constitution, article I, section 8, clause 3.

[2] 223 U.S. 1 (1912).

[3] 285 U.S. 22 (1932).

[4] 58 F. Supp. 338 (S.D.N.Y. 1944).

[5] *Wickard* v. *Filburn,* 317 U.S. 111, 125 (1942).

[6] 317 U.S. 111 (1942).

[7] Id. at 128.

[8] E.g., *Perez* v. *United States,* 402 U.S. 146 (1971); *Katzenbach* v. *McClung,* 379 U.S. 294 (1964); *Heart of Atlanta Hotel* v. *United States,* 379 U.S. 379 U.S. 241 (1964).

Only one Supreme Court decision in the last forty-five years in any way limits Congress' powers under the Commerce Clause. *National League of Cities* v. *Usery* [10] struck down as unconstitutional amendments to the Fair Labor Standards Act (enacted pursuant to the Commerce Clause) which purported to impose upon all public employment the minimum wage and maximum hour requirements previously applicable only to the private sector. The Court observed:

> "[T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner. * * *
>
> "One undoubted attribute of state sovereignty is the state's power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime." [11]

The "attributes of sovereignty" which are beyond Congress' reach were variously described in the course of the *National League of Cities* opinion as "functions essential to [the] separate and independent existence" of local governments,[12] activities of the "states qua states" [13] and "integral governmental functions".[14]

The Court illustrated what it meant by such terms by noting that they embraced fire prevention, police protection, sanitation, public health, and parks and recreation.

Providing rules to adjudicate product liability disputes is hardly an attribute of state government essential to its separate and independent existence. The *National League of Cities* is therefore easily distinguishable and has no application to the consideration of a federal product liability statute.

CONCLUSION

Congress is constitutionally empowered to adopt federal product liability tort legislation which determines the liability of parties for injuries arising out of commerce.

APPENDIX B

PARTICIPANTS—COALITION FOR UNIFORM PRODUCT LIABILITY LAW

Aeroil Products Co., Inc.
Aeroquip Corp.
Alberto-Culver Co.
The Allen Group Inc.
American Standard Inc.
Baker Perkins Inc.
Basset Furniture Industries, Inc.
Bemis Company, Inc.
Blue Bell, Inc.
Borg-Warner Corp.
Browning
Camco, Inc.
Cameron Iron Works, Inc.
Canron Inc.
Carpenter Technology Corp.
Castle & Cooke, Inc.
Clark Equipment Co.
Clorox Co.
Coachman Industries, Inc.
Coca-Cola Bottling Plants Inc.
Coleco Industries, Inc.
Coleman Co., Inc.
Coleman Systems
Colt Industries Inc.
Columbian Rope Company
Columbus McKinnon Corp.

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[9] A similar justification can be found as a result of the manner in which product liability insurance rates are determined: These rates are set on the basis of national experience, rather than on the basis of state-by-state experience. U.S. Dep't of Commerce, Task Force on Product Liability and Accident Compensation, Report on Product Liability & Insurance Ratemaking 11 (1980). As a result, they now reflect the damages that are paid under the liability regimes of each of the fifty states. Congress might therefore properly regulate these rates by changing these liability regimes through the adoption of a federal preemptive product liability law. (The Supreme Court has clearly stated that insurance constitutes interstate commerce, and is thus within the sphere of those activities that may be regulated by Congress. *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533 (1944)). Thus, by prescribing federal preemptive product liability rules, Congress can be said to be regulating insurance qua interstate commerce, rather than products qua interstate commerce.

[10] 426 U.S. 833 (1976).

[11] Id. at 845.

[12] Id. at 845.

[13] Id. at 847.

[14] Id. at 852.

Commercial Shearing Inc.
Cooper Industries, Inc.
Crompton & Knowles Corp.
Cross & Trecker Corporation
Cubic Corporation
Dana Corporation
Datapoint Corp.
Dayco Corp.
DeHavilland Aircraft of Canada, Ltd.
Dunham-Bush, Inc.
Dyneer Corp.
Echlin Mfg. Co.
Elcor Corporation
Ensign-Bickford Industries, Inc.
Everest & Jennings, International
Federal Signal Corporation
The Foxboro Company
Franklin Electric Co., Inc.
Fruehauf Corp.
GAF Corp.
GK Technologies Inc.
Gates Learjet Corp.
General Signal Corp.
General Tire & Rubber Co.
Goulds Pumps, Inc.
Great Lakes Chemical Corp.
Grow Group Inc.
Halstead Industries Inc.
Harnischfeger Corporation
Harris Corp.
Herman Miller Inc.
Hexcel Corp.
Hillenbrand Industries, Inc.
Inductotherm Industries, Inc.
Itel Corp.
Katy Industries, Inc.
Kennametal Inc.
Laclede Steel Co.
Leisure Group, Inc.
Liberty Industries, Inc.
Lockheed Corporation
Loctite Corp.
Lubbock Manufacturing Company
Masco Corp.
Maxon Corp.
McGraw-Edison Co.
Meredith Corp.
Midland-Ross Corp.
Modine Manufacturing Co.
Monarch Machine Tool Co.
Monogram Industries, Inc.
Munsingwear, Inc.
NCH Corp.
Navy Arms Company Inc.
Nor-Am Agricultural Products, Inc.
Oneida Ltd.
Parker Hannifin Corp.
Pittway Corp.
Power Rental Equipment, Inc.
Republic Corp.
Rexnord Inc.
Richardson-Vicks Inc.
Robertshaw Controls Co.
A. H. Robins Company, Inc.
Rohm & Haas Co.
Roper Corporation
Russell Corporation
Sanitary Scale Co.
Schering-Plough Corp.
A. O. Smith Corp.
Standard Tool & Mfg. Co.
Steward-Warner Corp.
Sundstrand Corporation
Tappan Co.
Tampax Inc.
Tecumseh Products Co.
Teradyne Inc.
Toyota Motor Sales USA, Inc.
Tracor, Inc.
U.S. Industries, Inc.
Valley Steel Products Co.
Van Dorn Co.
Vermont American Corp.
Vulcan Iron Works Inc.
Wham-O Mfg. Co.

[APPENDIX C]

COALITION FOR UNIFORM PRODUCT LIABILITY LAW—COMMENTS ON S. 2631

INTRODUCTION

In general, we support the approach taken by S. 2631. We agree that a federal product liability law should provide strict liability in the case of construction defects, and a negligence standard in cases of design or failure to warn defects.

Further, we believe that such a law should—as S. 2631 does—address the concerns of product sellers other than manufacturers, provide for comparative responsibility, take into account the problems caused by product misuse and alteration, address the work place aspects of the product liability problem, and address the evidentiary problem caused by subsequent remedial measures.

While we agree that federal legislation should contain a statute of repose and should address punitive damages, our prepared statement provides the general approaches in these areas that we believe are appropriate. That statement also sets forth our opinions on how the *Sindell* decision should be treated, and urges the inclusion of a provision not contained in S. 2631—the significance of government regulations and contract specifications.

This paper supplements our prepared statement, and is intended to call the Committee's attention to our additional concerns. Many of these might be described as technical comments.

DEFINITONS (SECTION 2)

Manufacturer.—As currently defined, this term includes merely those persons who "produce, make, or construct" a product. While this language may be sufficient to include all original manufacturers, many capital goods, especially when resold in the used equipment market, are often subject to processes that may not be included within these terms. Such products are often modified, sometimes redesigned, and otherwise altered by a person who acquires such goods from the original purchaser for resale. We suggest that persons who engage in such activities should be treated as manufacturers.

Also, this provision treats distributors, wholesalers, retailers, etc. as manufacturers only to the extent that the "produce, make, or construct" a product. However, often such persons "design" a product, and let a contract to a job shop for the actual fabrication. It would appear that to the extent that such persons actually design the product, they should be subject to manufacturers' liability for design defects.

Product Seller.—Unlike earlier staff drafts, the definition of this term no longer includes manufacturers. However, since "product seller" is defined to include one who "sells" his product, it appears that virtually all manufacturers will continue to be included within the embrace of this term, despite the omission.

We suggest that "product seller" should be expressly defined to include manufacturers. However, when product sellers who are not manufacturers are referred to (e.g., Section 8), the expression "product sellers other than manufacturers" should be used.

Practical Technological Feasibility.—We recommend that this term be defined to include a requirement that the technological and scientific knowledge be "generally accepted"; and, that in addition to being available and capable for use or implementation, such knowledge be "reasonable" for such use.

Additional definitions.—We suggest defining the terms "known" and "knowledge" should be defined to mean, in the context of a corporate entity, that a natural person in a reasonable position to assess the significance of information was aware of the information; and the terms "safe," "safer," and "safety", which connote personal injury, should be defined to clarify how they are to be applied in situations involving only property damage (with no risk of personal injury).

PREEMPTION OF OTHER LAWS (SECTION 3)

We suggest providing for the preemption of both inconsistent state and federal laws, as did Staff Working Draft No. 1.

RESPONSIBILITY OF MANUFACTURERS (SECTION 4)

We agree that the bill should limit the admissibility of expert opinion to that which can be supported or corroborated by sound objective evidence. However, we believe that this provision could be improved by requiring the "sound objective evidence" to be "generally accepted knowledge" within the particular field of expertise involved.

PRODUCT DESIGN AND CONSTRUCTION (SECTION 5)

Construction Defects.—We suggest clarifying that where a product deviates in a material way from otherwise identical units of the same product line, it is the *manufacturer's* product line that is being referred to. In this regard, it also should be clarified that the deviation created an unreasonable risk of harm for product users.

Design Defects.—The bill does not presently require a claimant to introduce an alternative design as evidence; nonetheless, it does require proof that a means to eliminate the danger that caused the harm was within practical technological feasibility. If a means to eliminate the danger was within practical technological feasibility, this almost always implies that an alternative design would be available. As a result, a claimant should be required to introduce such a design as evidence.

With respect to an alternative design, the bill provides that the alternative design be shown to have provided better safety with respect to the particular hazard, and merely *equivalent* or better overall safety with respect to all hazards. We suggest the bill be amended to require not only better safety with respect to the particular hazard, but also better overall safety than the chosen design. Under the present standard, liability could obtain where a claimant proved that an alternative design, which provided better safety as to the particular hazard, merely provided equivalent overall safety to the chosen design (i.e., it provided less safety as to other risks). As this would potentially subject manufacturers to liability for making equal safety trade-offs among potential hazards, we suggest that this provision be amended to require proof that the alternative design improved overal safety.

Additionally, we believe that for an alternative design to be considered, it should not violate government safety standards.

Finally, we recommend that this section be amended to provide that a manufacturer has no obligation to design a product to take into account misuse or alterations and modifications (as these terms are defined in Section 10.)

PRODUCT WARNINGS OR INSTRUCTIONS (SECTION 6)

One of the elements that must be established to prove liability under this section is that similarly situated reasonably prudent manufacturers would have provided the warnings, given the seriousness of the harm. We believe that "seriousness" is an inappropriate criteria; rather, "unreasonable risk of harm" would be preferable as it takes into account the probability of harm occurring.

Second, the bill does not address how post manufacture warnings or instructions should be given. We suggest that the bill be clarified to indicate that reasonable efforts in this regard are sufficient; as presently drafted, the bill may require personal notification, which in many instances would be impractical.

Former staff drafts provided that there was no obligation to warn of known dangers, a provision absent from S.2631. While the bill does provide a defense for obvious dangers, obvious dangers are not coextensive with known dangers. We recommend restoring this provision.

Finally, we believe that the bill should provide that a manufacturer has no duty to warn with respect to risks that are apparently unimportant, if by including warnings to such risks, it would detract from the effectiveness of the warnings otherwise provided.

PRODUCT FAILURE TO CONFORM TO EXPRESS WARRANTY (SECTION 7)

Unlike earlier staff drafts, S. 2631 does not require proof that the claimant relied on an express warranty in order to establish liability. Arguably, the concept of reliance is subsumed in the requirement that the failure of the product to conform to the warranty caused the harm. Nevertheless, we believe that the requirement that a claimant relied on the express warranty should be explicitly provided.

RESPONSIBILITY OF PRODUCT SELLER (SECTION 8)

As a result of the failure to utilize the convention adopted in earlier drafts (i.e., using the term "product sellers other than manufacturers"), it appears that most manufacturers will potentially be subject to liablility under this section (to the extent that they "sell" products), and under Section 4. We believe that the previous convention should be utilized to distinguish between manufacturers and non-manufacturer-product sellers. (See comments under definition of "Product Seller.")

This section also contains a provision regarding express warranty. We believe that reliance should be a requirement of this section, in accordance with our recommendations under Section 7.

This section also contains a provision with respect to expert opinion. We believe that this provision should be modified in accordance with our recommendations under Section 4.

COMPARATIVE RESPONSIBILITY (SECTION 9)

Unlike earlier staff drafts, this section does not provide for the diminution in claimant's recovery by the greater of (1) the amount of worker compensation benefits or (2) the employers portion of responsibility, except as provided in Section 10 (relating to product misuse and alterations or modifications). We urge that S. 2631 be revised to reflect this former approach.

This section also provides that judgment against each party determined to be liable shall be made "in proportion to the degree of responsibility." This provision is subject to several interpretations, and ought to be clarified. For example, if each of three persons, two of whom are defendants, and one of whom was a non-party, are determined to be equally responsible for claimant's $100.00 damages, is judgment in the amount of $33.33 to be entered against each of the two defendants (i.e., each *person's* proportionate share of responsibility)? Or in the amount of $50.00 against each of the two defendants (i.e., each *party's* proportionate share of responsibility)? We would urge that the former interpretation be adopted, and explicitly provided for.

We also urge the inclusion of a provision providing that where any person's responsibility is determined to be insignificant relative to all other responsibility, such responsibility is to be disregarded.

Finally, this section radically changes the rules of joint and several liability, long a part of our tort law. Where a judgment is uncollectible, it requires that damages be reallocated among all defendants, regardless of whether they are jointly or severally liable. This is in contrast to earlier staff drafts which reflected "Restatement (Second) of Torts," §881, requiring that liability be several where there is a distinct harm or a reasonable basis for apportioning fault. We recommend that the concept of joint and several liability be continued.

MISUSE OR ALTERATION (SECTION 10)

We believe that it would be helpful to expressly state that misuse includes improper maintenance of a product, or using a product which has worn-out.

EFFECT OF WORKER COMPENSATION (SECTION 11)

This section provides that the court shall determine the amount of worker compensation benefits where these have not been determined at the time of trial. While this is a commendable effort to deal with the problem of the failure to timely prosecute a worker compensation action, we fear that this provision could be used offensively by claimants in those jurisdictions with a relatively current trial calendar. As a result, we would urge the adoption of the treatment provided by Staff Working Draft No. 1, which permits the modification of judgment after worker compensation benefits are subsequently determined.

Finally, we believe that this section had the unintentional effect of prohibiting agreements between employers and manufacturers, whereby the former agrees to indemnify the latter for harms caused by the product in the workplace. Several companies require such agreements as a condition to the sale of their products. We believe that there is no valid policy objective achieved by prohibiting such agreements.

TIME LIMITATION ON LIABILITY AND ALTERNATIVE SECTION FOR TIME LIMITATION ON LIABILITY (SECTION 12)

Addressed in statement.

PUNITIVE DAMAGES (SECTION 13)

While our principal concerns are addressed in the prepared statement, we also believe that it would be preferable for the court to determine whether punitive damages should be awarded, in addition to the amount.

SUBSEQUENT REMEDIAL MEASURES (SECTION 14)

While we agree entirely with the objective of this section, we do not believe that it is effective to accomplish its purpose. While this section prohibits the introduction of evidence taken after an event to prove liability, this section does not expressly prohibit the admissibility of such evidence for other purposes.

FINDINGS AND PURPOSES

Undoubtedly, were this bill enacted into law, its constitutionality would be challenged. It would thus be helpful for S. 2631 to set forth the interstate aspects of the product liability problem in a section of findings and purposes, which, among other things, would indicate that the law is enacted pursuant to Congress's Commerce Clause powers.

GOVERNMENT STANDARDS AND CONTRACT SPECIFICATIONS

Addressed in statement.

APPENDIX D—SUMMARY OF STATE STATUTES OF REPOSE

State	Time	Running from	Comments	Exceptions	Cite
1. Alabama	10 years	Date of first use.		1. Failure to alter, recall, inspect or issue warnings or instructions if the government so requires.	Ala. Code § 6-5-502 (1957).
2. Arizona	12 years	Date of first sale.		1. Negligence of manufacturer or seller;. 2. breach of express warranty	Ariz. Rev. Stat. Ann. § 12-551 (1982).
3. Colorado	10 years	Date of first sale.	Applies only to equipment.	1. Hidden defects; 2. prolonged exposure; 3. fraud	Colo. Rev. Stat. § 13-80-127.6b. (Supp. 1980).
4. Connecticut	10 years	Date of loss of control.	Useful safe life [1].	1. Extended pursuant to terms of express written warranty;. 2. intentional misrepresentation; 3. fraudulent concealment of information about the product.	Conn. Gen. Stat. Ann. § 52-577a. (West Supp. 1981).
5. Florida [2]	12 years	Date of first sale or date of commission of alleged fraud.		None	Fla. Stat. Ann. § 95.031 (West 1981).
6. Georgia	10 years	Date of first sale.		None	Ga. Code Ann. § 105-106(b)(2) (Supp. 1981).
7. Idaho	10 years	Date of delivery.	Useful safe life [1].	1. Express warranty; 2. fraud; 3. prolonged exposure to a defective product; injury causing aspect of product was not discoverable by a reasonable person until more than ten years after time of delivery; the harm caused did not manifest itself until ten years after time of delivery.	Idaho Code § 6-1403 (Supp. 1980).
8. Illinois	12 years or	Date of first sale.	Applies only to strict liability.	1. Special rules for alteration, modification or change of product unit;. 2. undiscovered injuries; 3. under age 18, insane, mentally ill, or imprisoned.	Ill. Ann. Stat. ch. 83, § 21.2.
	10 years	Date of delivery.			
9. Indiana	10 years	Date of sale		1. If cause of action accrues more than eight years but not more than 10 years after initial delivery, action may be commenced any time within two years after cause of action accrues.	Ind. Code § 33-1-1.5-5 (Supp. 1978).
10. Kansas	10 years	Date of delivery.	Useful safe life [1].	1. Express warranty; 2. fraud; 3. prolonged exposure to a defective product; injury causing aspect of product was not discoverable by a reasonable person until more than ten years after time of delivery; the harm caused did not manifest itself until ten years after time of delivery.	Kan. Stat. Ann. § 60-3303 (Supp. 1981).

Footnotes at end of table.

APPENDIX D—SUMMARY OF STATE STATUTES OF REPOSE—Continued

State	Time	Running from	Comments	Exceptions	Cite
11. Kentucky	5 years or	Date of first sale.	Rebuttable presumption that the product was not defective if injury, death, or property damage occurred after the 5/8 years.	None	Ky. Rev. Stat. Ann. § 411.310 (Baldwin 1979).
	8 years	Date of manufacture.			
12. Minnesota	1. determined by trier of fact.		1. Useful safe life of product [1].	None	Minn. Stat. Ann. § 541.05 (West Supp. 1982).
	2. 4 years		2. Strict liability only.		
13. Nebraska	10 years	Date of first sale.		1. Indemnity of contribution actions brought by manufacturer or seller of a product;. 2. exposure to asbestos	Neb. Rev. Stat. § 25-224 (1979 and Supp. 1981).
14. New Hampshire	12 years	Date of manufacture or first sale whichever occured last.		1. Fraudulent misrepresentation, concealment, or nondisclosure;. 2. different period of limitation based on a written contractual obligation;. 3. actions brought which do not seek damages for or on account of injury to person or property.	N.H. Rev. Stat. Ann. § 507-D:2 (Supp. 1979).
15. North Carolina	6 years	Date of first sale.		None	N.C. Gen. Stat. § 1-50(6) (Supp. 1979).
16. North Dakota	10 years or	Date of first sale.		1. Does not apply to any cause of action where the personal injury, death, or damage to property occurs two years after effective date;. 2. failure to notify user of product of recall of that product.	N.D. Cent. Code § 28-01.1-02 (Supp. 1981).
	11 years	Date of manufacture.			
17. Oregon	8 years	Date of first sale.		None	Or. Rev. Stat. § 30.905 (Supp. 1979).
18. Rhode Island	10 years	Date of first sale.		None	R. I. Gen. Laws § 9-1-13, § 6A-2-725(5) (Supp. 1980).
19. South Dakota	6 years	Date of first sale.		1. Causes of action which have arisen prior to effective date.	S.D. Codified Laws Ann. § 15-2-12.1 (Supp. 1981).

Footnotes at end of table.

APPENDIX D—SUMMARY OF STATE STATUTES OF REPOSE—Continued

State	Time	Running from	Comments	Exceptions	Cite
20. Tennessee	Shorter of 10 years or 1 year after expiration of anticipated life of the product.	Date of first sale.		1. In the case of injury to minors, action must be brought within a period of one year after attaining the age of majority.	Tenn. Code Ann. § 29-28-103 (1980).
21. Utah	6 years or	Date of first sale.		1. Does not apply to personal injury, death, or damage to property within two years after the effective date.	Utah Code Ann. § 78-15-3 (1953).
	10 years	Date of manufacture.			
22. Washington	12 years	Date of delivery.	Useful safe life [1].	1. Express warranty; 2. fraud; 3. exposure to a defective product within the useful safe life of a product.	Wash. Rev. Code § 7.72.060 (Supp. 1981).

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[1] "Useful safe life" indicates that time limit may be rebutted proving that useful safe life of product has not expired.

[2] Determined to violate state constitution.

Senator KASTEN. Mr. Ford, thank you.

Our next witness will be Mr. Herbert Goetz, who is the manager for product safety, Cincinnati Inc., and he is accompanied by Mr. Wendell Lund. Mr. Goetz.

Mr. GOETZ. Thank you, Mr. Chairman.

I am here today on behalf of the National Product Liability Council, an organization of small to large companies, most of which manufacture capital or producer goods.

In March, I had the privilege of testifying on behalf of the NPLC at your hearings on tort reform. I am impressed with many of the features of S. 2631 which grew out of those hearings.

On behalf of the NPLC and my company, I wish to thank you, Senator Kasten, and your seven colleagues joined in introducing the bill, as well as the staff of the subcommittee who have worked on the bill for their serious and thorough approach to the product liability problem, whose amelioration is so important to the members of the NPLC and to my company.

I especially want to thank Senator John Glenn, my Senator from Ohio.

As manager of product safety, I have been intimately involved on behalf of my company in litigation throughout the country in product liability cases, and this experience has fortified my view as to the need for Federal legislation in product liability law. The diversity and inconsistency now found in the tort law of the 50 States complicates and impairs the legal process to the detriment of sellers, claimants, and consumers. The result is confusion, instability, and increased costs to all concerned.

My work has convinced me of the critical need for Federal action to provide uniformity and predictability in product liability law.

My comments today will be addressed to section 12, Time Limitation on Liability, and the alternative section for Time Limitation on Liability. My company and others like us are being forced to expend large amounts of money and time to defend products that left our control 10, 20, and 40 or more years ago. Products that in many cases have changed ownership three or four times since the time of first sale and delivery and have been altered or misused.

As I stated in my testimony in March, the quality and durability of our products have in a sense penalized us. The long life exposure of our products is inherent in our product liability dilemma, and while I am extremely proud of the quality of our products, this fact does not seem as fortunate in the view of the way product liability law has evolved in the courts.

In view of this situation, sound policy reasons support sensible time limitations on the bringing of product liability actions. The Oregon Supreme Court has addressed this problem, and I have included a reference to that in my prepared statement. The Oregon Supreme Court's second rationale in their decision, namely, "The public policy of allowing people after the lapse of a reasonable time to plan their affairs with a degree of certainty free from the disruptive burden of protracted and unknown potential liability," applies with special force to manufacturers of capital goods.

The NPLC agrees that a definite time limitation should be established for the responsibility of the manufacturer in tort law for his product. Our difference with S. 2631 is as to what that time limitation should be.

In previous testimony the NPLC has suggested the time limitation of 10 years which we believe is sufficient to discover faults owing to unsafe design or failure to warn about the danger connected with the product.

We believe that the bill's alternative proposal, a 10-year rebuttable presumption also fails to further the objectives sought to be achieved by a time limitation on liability. Even if we assume that a rebuttable presumption approach would improve the ability to defend against claims based on very old products, a rebuttable presumption, by continuing to hold out the hope of recovery, would continue to encourage the bringing of such claims, and thus would not significantly reduce transaction costs of the product liability system.

Furthermore, by merely reducing but not eliminating the manufacturer's exposure in cases involving very old products a rebuttable presumption approach would not adequately advance the objective, in the words of the Oregon Supreme Court, "of allowing people after the lapse of a reasonable time to plan their affairs with a degree of certainty, free from the disruptive burden of protracted and unknown potential liability."

The NPLC believes that more than is proposed in section 12 is needed to achieve the policy purposes of S. 2631. We are therefore suggesting that either the time bar ought to be reduced to a shorter period of 10 years—my experience suggests that the evidentiary problems increase markedly after 10 years—or if it is determined that a rebuttable presumption is necessary, it should accompany an effective overall time bar of no more than 15 years.

I am clearly convinced that the provisions that we suggest amending section 12 to a time limitation of 10 years or a rebuttable presumption with a 15-year bar will substantially reduce transaction costs connected with product liability.

As I stated in previous testimony, I want to make clear that we are not asking that anyone be denied the right to make claims against faulty products. In fact, our view is just the opposite. We believe that a manufacturer who designs, manufactures, and sells a faulty product should assume his share of responsibility for harm caused by that product. Moreover, exceptions from the bar can be made for what are believed to be more compelling cases such as the exception for fraud in the present bill.

In my previous testimony I have stated that the product liability insurance costs to my company have increased over 4,000 percent in 11 years, 1970 to 1982. This works out to $200 per machine manufactured in 1970, and has increased to $11,000 per machine manufactured in 1982. Costs of this magnitude just become an exceedingly heavy burden for the manufacturer.

The NPLC believes that a shorter time limit than now proposed or a combination of a shorter time limit and a rebuttable presumption will come closer to meeting the policy goals stated by Senator Kasten and to ameliorating the serious product liability problem which now burdens the Nation's commerce.

Thank you for permitting me to participate once again in the subcommittee's hearings.

[The statement follows:]

STATEMENT OF HERBERT W. GOETZ ON BEHALF OF THE NATIONAL PRODUCT LIABILITY COUNCIL

My name is Herbert W. Goetz. I am Manager of Product Safety for Cincinnati Incorporated, a small, privately-owned company located in Cincinnati, Ohio, which specializes in the manufacture of metal fabricating machinery used for cutting and bending material. I am here today on behalf of the National Product Liability Council (NPLC), an organization of small to large companies most of which manufacture capital or producers' goods.

In March I had the privilege of testifying on behalf of NPLC at your hearings on tort reform. I am impressed with many of the features of S. 2631 which grew out of those hearings. On behalf of NPLC and my company I wish to thank Senator Kasten and his seven colleagues who joined him in introducing the bill, as well as the staff of the subcommittee who have worked on the bill, for their serious and thorough approach to the product liability problem whose amelioration is so important to the members of the NPLC and to my company.

As Manager of Product Safety, I have been intimately involved on behalf of my company in litigation throughout the country in product liability cases, and this experience has fortified my view as to the need for Federal legislation in product liability law. The diversity and inconsistency now found in the tort law of the fifty states complicates and impairs the legal process to the detriment of sellers, claimants, and consumers. The result is confusion, instability, and increased costs to all concerned.

My work has convinced me of the critical need for Federal action to provide uniformity and predictability in product liability law.

My comments today will be addressed to Section 12, "Time Limitation on Liability", and the "Alternative Section for Time Limitation on Liability". I am emphasizing this section because the other sections in the bill are being discussed by other witnesses and because this section is especially important to manufacturers of capital goods in our country and, I believe, to our national economy as a whole.

My company and others like us are being forced to expend large amounts of money and time to defend products that left our control 10, 20, and 40 or more years ago; products that in many cases have changed ownership three or four times since the time of first sale and delivery, have been altered or misused, or are now being used for different purposes than those for which they were manufactured. As I stated in my testimony in March, the quality and durability of our products have in a sense penalized us. The long-life exposure of our products is inherent in our product liability dilemma; and while I am extremely proud of the quality of our products, this fact does not seem as fortunate in view of the way product liability law has evolved in the courts.

In view of this situation, sound policy reasons support sensible time limitations on the bringing of product liability actions. The Oregon Supreme Court, recognizing these policy reasons, stated in *Johnson* v. *Star Machinery Company:*

"In general, there are usually two reasons which are advanced as justification for the imposition of such statutes. The first concerns the lack of reliability and availability of evidence after a lapse of a long period of time. This rationale primarily protects defendants who, without prior notice of pending claims, would necessarily find it extremely difficult, if not impossible, to mount a defense because of the nonpreservation of evidence and the disappearance or death of witnesses after a long lapse of time. However, the reliability of plaintiff's evidence relating to long-past occurrences, transactions or conditions is also a relevant feature.

"The second rationale concerns public policy of allowing people after the lapse of a reasonable time to plan their affairs with a degree of certainty, free from the disruptive burden of protracted and unknown potential liability.

* * * * * * *

"These rationales are obviously applicable without regard to whether or not undetected damage had occurred at the time of the original negligence. 530 P. 2d at 56."

The court's second rationale, namely, "the public policy of allowing people after the lapse of a reasonable time to plan their affairs with a degree of certainty, free from the disruptive burden of protracted and unknown potential liability," applies with special force to manufacturers of capital goods.

The NPLC agrees that a definite time limitation should be established for the responsibility of the manufacturer in tort law for his product. Our difference with S. 2631 is as to what that time limitation should be. In previous testimony the NPLC has suggested the time limitation of 10 years which we believe is sufficient to discover faults owing to unsafe design or failure to warn about the danger connected with the product.

We believe that the bill's alternative proposal, a 10 year rebuttable presumption also fails to further the objectives sought to be achieved by a time limitation on liability. Even if we assume that a rebuttable presumption approach would improve the ability to defend against claims based on very old prodcuts, the rebuttable presumption, by continuing to hold out the hope of recovery, would continue to encourage the bringing of such claims and thus would not significantly reduce transaction costs of the product liability system. Furthermore by merely reducing but not eliminating the manufacturer's exposure in cases involving very old products, the rebuttable presumption approach would not adequately advance the objective, in the words of the Oregon Supreme Court, "of allowing people after the lapse of a reasonable time to plan their affairs with a degree of certainty, free from the disrpruptive burden of protracted and unknown potential liability."

NPLC believes that more than is proposed in Section 12 is needed to achieve the policy purposes of S. 2631, which were stated by Senator Kasten in introducing the bill, namely, to provide greater certainty in product liability law and to reduce transaction costs. We are therefore suggesting that either the time bar ought to be reduced to a shorter period of 10 years—my experience suggests that the evidentiary problems increase markedly after 10 years—or if it is determined that a rebuttable presumption is necessary, it should accompany an effective overall time bar of no more than 15 years.

I am clearly convinced that the provisions that we suggest amending Section 12 to a time limitation of 10 years or a rebuttable presumption with a 15 year bar would substantially reduce transaction costs connected with product liability. Section 12 could also be expanded to include products as defined by the bill.

As I stated in previous testimony, I want to make clear that we are not asking that anyone be denied the right to make claims against faulty products. In fact, our view is just the opposite. We believe that a manufacturer who designs, manufactures and sells a faulty product should assume his share of responsiblity for harm caused by that product. Moreover, exceptions from the bar can be made for what are believed to be the more compelling cases—such as the exception for fraud—in the present bill.

In my previous testimony I have stated that product liability insurance costs to my company have increased over 4,000% in 11 years, 1970 to 1982. This works out to $200 per machine manufactured in 1970 and has increased to $11,000 per machine manufactured in 1982. In just the last year, these costs of my company have grown from 3.3% of sales in 1981 to an estimated 7.7% of sales in 1982. It is easy to see how costs of this order of magnitude are a very heavy burden which must be borne by the manufacturer and ultimately passed on to the user and to the consumer.

Speaking for my company and for all the companies that compose the National Product Liability Council, I trust that your subcommittee will fashion a bill which contains a time limitation section which is realistic and effective. To be realistic and effective, it is our believe that a shorter time limit and a rebuttable presumption will come closer to meeting the policy goals stated by Senator Kasten and to ameliorating the serious product liability problem which now burdens the nation's commerce.

Thank you for permitting me to participate once again in the subcommittee's consideration of product liability legislation.

Senator KASTEN. Mr. Goetz, thank you.

Next is Mr. David Greenberg, legislative director of the Consumer Federation of America.

Mr. Greenberg.

Mr. GREENBERG. Thank you, Senator Kasten.

As a coalition of over 200 national, State, and local consumer groups, labor unions, farm organizations, and senior citizen groups, Consumer Federation of America is vitally interested in the product liability debate. We have followed it closely and will continue to do so.

I had intended to make some remarks about aspects of S. 2631 other than section 12, but the remarkable recommendation of Mr. Ford's coalition has persuaded me to confine myself to statutes of repose.

The alternative statutes of repose in section 12 represent one of the most troubling features of the bill before us today. The mechanisms differ, but the time limitations provide defendants with a kind of safe harbor from litigation, and in so doing create a minefield for plaintiffs. Looking at the evidence, it is difficult to understand the push for statutes of repose, for of all the items included under the rubric of product liability reform, the statute of repose is the least necessary, least justifiable, and most politically damaging one.

Of course, we understand that manufacturers worry about litigating suits concerning old products. So do plaintiffs—because they have to establish both defect and causation, a process made quite difficult by old evidence and by the fact that improper maintenance, normal wear and tear, alteration or misuse may have caused the defect in question. These problems of proof are by no means theoretical ones. They show up in litigation statistics. Fully 97 percent of all product liability suits are brought within the first 5 years of product life, and in the 3 percent brought after that time, plaintiff success rates are demonstrably worse.

Thus, in litigation concerning old products, we are talking about a small number of cases, each of which will have some very tough elements of proof for plaintiffs, and yet we are being told today that even in the few instances when a small number of plaintiffs could leap these hurdles of proof, they should be denied the opportunity to attempt to do so.

We simply could not disagree more. With all these difficulties of proof and a lower success rate that goes along with them, why is it that certain groups continue *to demand statutes of repose*? You have heard the answer today, Senator Kasten, and it is as simple as it is unfortunate. Once it has run, a statute of repose shifts the entire risk of dangerously defective products onto the consumers, workers and bystanders who come into contact with them. Not only is such a shift unjust, it is economically inefficient, for it weakens manufacturers' incentives to make safe products. Absolute freedom from liability shields producers from receiving and acting upon the crucial economic incentives created by liability judgments. Those incentives produce innovation, a higher level of safety, lower injury rates, and, in the end, lower product liability insurance premiums. In a very real sense, statutes of repose are a barrier to one of the most important free market signals that should lie at the base of American manufacturing.

Incredibly, the testimony from Mr. Ford's coalition asks you not to help them manage their risks but to help them dispose of those risks. But risks of this kind cannot be eliminated by liability rules. They can only be shifted, in this case, squarely into the laps of American consumers and workers.

I would like to make a couple of brief comments about the alternative statutes in section 12, both of which CFA opposes. I have to admit, however, that quite surprisingly, they have been made to look moderate by some of the recommendations you have just heard.

The first alternative would bar design or warning claims involving capital goods after 25 years. Like all specific year limits, the 25-year period is an arbitrary one. Capital goods have varying lifetimes which this provision does not take into account. Accordingly, the 25-year limitation, besides eliminating a number of valid claims that would not arise until later, would also diminish somewhat the incentive to produce and guarantee machinery that lasts longer.

Even the one positive aspect of this alternative, that it would wipe out existing State repose statutes that apply to consumer as well as capital goods, may be elusive. I have no doubt that the drafters intended to leave consumer goods outside the scope of this alternative. Nevertheless, reading section 12 in combination with the preemption language in section 3, a State legislature could possibly conclude that it is free to enact a statute of repose for consumer goods. Such statutes would obviously be challenged, but without the Federal courts to arbitrate, only a Supreme Court grant of cert would ultimately resolve the issue.

Meanwhile, the intent of the drafters of S. 2631 would be frustrated, to the extreme detriment of consumers.

The second alternative clearly applies to all goods but creates a 10-year presumption instead of a 25-year bar. This presumption can be overcome only by clear and convincing evidence. Thus the problems plaintiffs experience in proving an actionable defect and legal causation in litigation concerning old products would be intensified by this alternative. So while on its face it does not bar any claims, we feel that as a practical litigation matter, it may operate to discourage or cut off otherwise legitimate suits.

Simply put, Senator Kasten, whether as an absolute cutoff or a superpresumption, a statute of repose has no place in a fair and balanced set of product liability standards. But the recommendations you heard today—to expand the absolute cutoff to include all products, shorten the time limit to 10 years, and basically eliminate the exceptions for long-term exposure, fraud and misrepresentation are, to put it quite bluntly, outrageous.

I know my time is up. Thank you.

[The statement follows:]

STATEMENT OF DAVID I. GREENBERG, LEGISLATIVE DIRECTOR, CONSUMER FEDERATION OF AMERICA

Senator Kasten and members of the Subcommittee. Consumer Federation of America (CFA) appreciates this opportunity to testify on S. 2631, the Product Liability Act.

As a federation of over 200 national, state and local consumer groups, labor unions, farm organizations, rural cooperatives and credit unions, CFA is vitally interested in the product liability debate. We have followed product liability developments closely, commenting on the Commerce Department's Uniform State Product Liability Act (UPLA) and, in an attempt to sort out the conflicting claims of the mid-1970's, publishing "The Product Liability Controversy: A Handbook for Consumers." More recently, we provided this Subcommittee our views on Staff Drafts I and II, the documents which set the basic framework for S. 2631.

After examining the evidence from the 1970's, observing the legislative response at the state level, and analyzing S. 2631, we believe that our constituency of consumers, workers, farmers and senior citizens will lose much more than it will gain from this present legislative effort to preempt state product liability laws. It is our position that the product liability crisis represented a legitimate concern of manufacturers and insurers over rising insurance premiums, and we pledge our willingness to work with them to stem any remaining vestiges of that problem. But we do not believe that the solution is a federal takeover of product liability law.

THE EVIDENCE ABOUT THE PRODUCT LIABILITY CRISIS

The agitation of the mid 1970's concerning product liability law grew out of the steep increases in certain manufacturers' insurance premiums. Insurance carriers attributed those increases—reported in some cases to be 200-400%—to the mushrooming of product liability lawsuits. Certain insurance companies advertised nationwide that such claims numbered one million annually.

The industry public relations campaign further justified rate increases by pointing to court decisions holding manufacturers liable for injuries sustained by plaintiffs doing bizarre, inappropriate things with consumer products and workplace machines. We all remember the most famous plaintiff, the man who recovered for injuries suffered when he attempted to trim his tall hedges by hoisting a rotary lawn mower into the air. As you might recall, both the one million figure and the lawn mower victim proved to be apocryphal, the former was reduced by best estimates to no more than 140,000, while the latter has never been documented.

The 1975 Interagency Task Force on Product Liability, organized at White House request, did document substantial insurance premium increases, particularly in high-risk product industries such as pharmaceuticals, automotive parts and medical devices. Even in these high risk industries, however, the Task Force reported that the average cost of product liability premiums barely exceeded 1% of total sales.

The Final Report of the Task Force, issued in November 1977, cited several factors as sources of rising insurance premiums: subjective and irrational insurance ratemaking practices, past misjudgments regarding appropriate product liability premium levels, unsafe manufacturing practices, increases in the number and complexity of products, heightened consumer awareness and willingness to seek legal redress, expansion by courts of the rights of injured plaintiffs, and inflation. Because of the multiplicity and complexity of these causes, it is not surprising that the Task Force's Legal Study cast severe doubt on product liability law preemption as a potential solution. According to the Legal Study, such proposed remedies ". . . even if considered equitable to the plaintiff, could have only a marginal impact on diffusing the claimed insurance problem." "In other words," the study concluded, "no inequitable doctrine or group of doctrines, even changed immediately, could produce a greater availability of or a lower cost for insurance."

Since the time of the Task Force, the federal government has taken two significant steps to ease the cost of liability insurance to manufacturers: first, the Revenue Act of 1978 greatly expanded the tax deductibility of product liability judgments and settlements costs; second, the Risk Retention Act of 1981 has given small manufacturers an alternative to traditional insurance carriers by allowing them to create their own self-insurance pools. CFA believes that this last measure has far greater potential for protecting industry against liability premium increases than does the preemption of state law.

We are concerned, however, that there appears to be little activity to implement actual risk retention plans. We hope this lack of immediacy reflects a moderating of liability insurance premiums to the point that the costs of setting up self insurance pools outweigh the anticipated savings, although we acknowledge that it may well reflect problems in implementing the Risk Retention Act itself. We urge the Subcommittee to hold hearings to monitor the progress of risk retention plans, their impact on insurance company rate making, and their overall effect on product liability premiums.

Also since the time of the Task Force Report, the Rand Corporation's Institute for Civil Justice has released a report which provides additional evidence that the product liability crisis should not be attributed to the evolving doctrines of liability that S. 2631 seeks to reverse. A portion of the Rand Study on trends in jury trials collected data on every product liability jury case tried between 1959 and 1979 in Cook County, Illinois, which includes Chicago. The results are suprising, and do not support a conclusion that federal preemption is necessary.

First, at the height of the product liability crisis, the number of trials increased only slightly—from 220 in 1970–1974 to 234 in 1974–1979.

Second, the overall success rate for plaintiffs over the twenty-year period was among the lowest of the categories surveyed. Plaintiffs won 38% of product injury cases, second lowest to malpractice (where plaintiffs won 33% of the cases) out of the 11 categories. Apparently the shifts in standards of liability have not made it any easier for plaintiffs to win judgments.

Third, the recent success rate for plaintiffs—during the height of the crisis—increased only slightly, from 36% in 1965–69 to 40% in 1975–1979, and acutally fell slightly from the 41% rate in 1970–74.

While this evidence comes from only one state, it certainly casts some strong initial doubt on the connection between what has happened in the courtroom and what has transpired in product liability insurance ratemaking. Similar doubts are raised by figures cited by plaintiffs lawyers—which CFA has not confirmed—that the major product liability carriers collected $1.9 billion in premiums in 1980 but paid out only 300 million. As scanty as this evidence may be, it suggests to us that more study and analysis is an absolute prerequisite to any effort to strip states of their power over product liability.

THE FORGOTTEN CRISIS: UNSAFE PRODUCTS

The need to proceed cautiously is even more crucial when viewed in the context of the number of product hazards in the marketplace.

Despite the handwringing of the 1970's, the number of product liability lawsuits is actually quite small compared to the number of injuries caused by defective products. While the number of claims cannot be pinpointed, estimates range from 60,000 to 140,000 annually. The number of people injured in household accidents alone—the bulk of which are product related—simply dwarfs that figure: According to the National Safety Council's recent data, 23,000 deaths, 3 million disabling injuries and 19.8 million other injuries occur annually. As a result of its impact on the current rights of plaintiffs and defendants, the Product Liability Act may well increase the gap between injuries and lawsuits, diluting the deterrent value of any given claim and thus weakening manufacturers' incentive to design for safety.

THE IMPACT OF PREEMPTION

The proposed Product Liability Act wipes out decades of state law, law which has proved itself capable of adapting to changing economic conditions and social expectations. The common law process has moved step by step—often haltingly—to balance the competing interests of consumers and workers in product and workplace safety against those of manufacturers, distributors and sellers in efficient production methods and product innovation.

Over time, the increasing complexity of products—combined with their ability to cause massive harm—has forced state courts to reexamine legal doctrines, standards of proof and trial procedures formulated in much simpler tort suits. Any legal system—state or national—would suffer a series of fits and starts and mistakes in the process of modernizing doctrine to accommodate problems like design liability, facts common to hundreds of pieces of individual litigation, and *Sindell* or *Bickler* controversies.

Because these questions are difficult, the chances for mistakes are large. Thus in our view, it is fortunate that each state has been able to examine the doctrinal developments in all other states as a laboratory for its own new principles. In this sense, the process is self-correcting, for errors in one state need not ripple across the country as would flawed national standards. And while some states have responded to many of these issues with product liability statutes of varying degrees of regressivity, others—including the major population and litigation centers of New York, Massachusetts, New Jersey, Maryland, Illinois, Ohio, Texas, California and Pennsylvania—have continued to rely on the common law process.

By overturning this process, S. 2631 seeks, in part, to derive gains in certainty, predictability and reduced transactions costs from a set of national product liability standards. We fear that such uniformity is at best an illusion and that the attempt to achieve it may acutally work as a destablizing influence.

Our fear is based on four factors. First, S. 2631 creates a new lexicon of product liability terms and standards which will have to be defined, for example, "practical technological feasibility" and "sound objective evidence."

Second, these new terms and concepts will be fleshed out by fifty state courts each with their own product liability history and biases. To the extent that the courts employ varying definitions, the sought after uniformity will be lost. Probably the only means to avoid this definitional quagmire is by vesting authority for interpreting the Product Liability Act in United States federal courts.

Third, the preemption section of S. 2631 is unclear as to its effect on state constitutional requirements. If the legislation is not intended to override state constitutions, then certain features (the statute of repose for instance) may not survive state constitutional scrutiny. If the legislation is meant to overcome state constitutions, the language of Section 3 should be made more explicit. In either case, the status of state constitutions under S. 2631 is a likely source of litigation, adding to uncertainty regarding the Act's ultimate impact.

Finally, evidence of a colloquial sort suggests that product liability insurance premiums have moderated recently. But should S. 2631 become law and 50 state courts begin to struggle with its effect on their own common law doctrines, statutes and constitutions, the crazy quilt of decisions that will inevitably emerge could set off a new round of rate increases and panic pricing by insurance carriers. That is an ironic—but not implausible—scenario for a legislative effort geared to the exact opposite goal.

THE PROVISIONS OF THE PRODUCT LIABILITY ACT

S. 2631 takes three broad approaches in its attempt to counter the underlying problem of product liability insurance rates. First, in order to reduce transaction costs and uncertainty, the legislation imposes national standards for most—but not all—product liability issues. That is certainly a legitimate goal, although as we indicated above, we believe it is a largely unachievable one.

Second, in the national standards it imposes, S. 2631 shifts liability standards to make it more difficult in most major cases for plaintiffs to recover for their product injuries. We do not see this second approach as a legitimate response to the product liability problem. If insurance costs were reduced by enactment of this legislation, it would be because consumers and workers were being forced to bear more of the costs of product failure, a result we believe is inefficient economically and unjust as social policy.

Third, S. 2631 uses a variety of techniques—extraordinary burdens of proof, presumptions, and limitations on evidence are three examples—to create a subtler but no less important shift in the costs of bringing plaintiffs' cases. If the Act were law, certain cases would become too costly and/or too uncertain to litigate, thereby leaving many injured consumers and workers with theoretical product liability claims but no practical legal recourse. Like the second approach, this approach is, for the most part, an inequitable way of trying to limit product liability insurance costs.

The specific provisions of the Act do eliminate some state law that works against the legitimate interests of injured consumers and workers, including regressive statutes of repose, harmful comparative negligence decisions and a few less than adequate approaches to strict liability for construction defects. Nevertheless, by eliminating most of the progressive case law trends for plaintiffs—and locking that law into place so that states may not go beyond the federal statutory standards—S. 2631, on balance, is destructive of consumer interests, and we believe, the overall level of product safety.

In broad brush the Act changes the most progressive state laws in five major ways:

1. *Thresholds.* The legislation erects several bars to litigation. Despite their injury, certain plaintiffs would be unable to prosecute liability claims under the Act.
2. *Standards of liability.* The legislation weakens the legal standard applicable in many states to the conduct of manufacturers, distributors and retailers.
3. *Standards of proof.* The legislation raises the amount of proof plaintiffs must offer in certain circumstances and limits the utility of certain evidence in others.
4. *Defenses.* The legislation expands the ways in which manufacturers can avoid liability even if plaintiffs prove that a dangerous product made by the defendant caused the injury in question.
5. *Measure of damages.* The legislation restricts the amount of punitive damages that may be recovered by limiting their applicability and by erecting a very stringent legal standard affecting cases where punitive damages may apply.

THRESHOLD BARS

Certain features of the Act may make it futile for injured plaintiffs to bring lawsuits. Two examples are prominent: (1) the alternative statutes of repose in Section 12; and (2) the Section 4(c) procedure that is part and parcel of the statute's overruling of the *Sindell* and *Bickler* decisions from California and New York, respectively.

(1) Statutes of repose—Section 12

The alternative statutes of repose in Section 12 represent one of the most troubling features of S. 2631. While the mechanisms and time periods differ, these time limitations provide defendants a safe harbor from litigation—and in so doing create a veritable mine field for plaintiffs. Looking at the evidence, it is difficult to understand manufacturers' strong push for statutes of repose. For of all the items in the grab bag of product liability reform, the statute of repose concept is the least necessary, least justifiable, and most politically damaging one.

The battle cry to establish statutes of repose emerges fundamentally from manufacturers' concern about litigation involving old products. They worry about the so-called long tail of liability, stretching for years after products leave their hands. Yet the available data suggest that, overall, this perceived problem simply does not exist. Fully 97% of all product liability actions are brought within the first five years of product life. The remaining 3% of cases should cause no real problem for insurers spreading risk among—and setting premium levels for—entire industries.

Nor are plaintiffs more successful in litigation concerning old products. Data from the insurance services office demonstrate that while 72% of all bodily injury claims were closed with some payment, only 58% of claims involving products 10 years or older were closed with payment. The likely reasons that plaintiffs' success rates fall in these trials should be clear. While manufacturers despair about the difficulties of working with old or unavailable evidence, that problem affects plaintiffs even more directly, for they must carry the burden of proof in these lawsuits. Not only do plaintiffs have to prove the existence of a defect at the time the product left the manufacturer's control, but they must also demonstrate causation—i.e., that the defect itself produced injury and not improper maintenance, normal wear and tear, alteration, misuse or intervening actions of other parties. In the few instances when plaintiffs can leap all the above hurdles, we believe they richly deserve to recover for their injuries. In any case, it cuts against the most fundamental notions of justice to bar them from even attempting this proof.

Given the difficulties of proving defect and causation in cases concerning old products—and plaintiff's lower success rate that these difficulties produce—why do certain groups continue to demand statutes of repose, first in the states and now at the national level? The explanation is as simple as it is unfortunate. Ultimately, a statute of response shifts the entire risk of dangerously defective products onto consumers, workers and other potential victims. Not only is such a total shift unjust, it is also economically inefficient, for it weakens manufacturers incentives to produce safe products. Absolute freedom from liability shields producers from receiving and acting upon the crucial economic incentives created by liability judgements. Those incentives produce innovation, additional safety features, better products, a higher level of safety, and in the end, lower injury rates and lower product liability insurance premiums. In a very real sense, statutes of repose are a barrier to the free market signals that should lie at the base of American manufacturing.

Nevertheless, S. 2631 proposes two alternative statutes of repose, which I will discuss in turn.

The first alternative would provide a complete bar to claims involving design or failure to warn defects for capital goods after 25 years. This proposal follows the approach of 15 states, whose statutes of repose bar claims an average of 10 years after the time of first sale. The rationale for this alternative is to prevent "long-tail" liability problems and to discourage unfounded suits for injuries caused by worn-out or misused products. However, the causation problems previously discussed which face plaintiffs should be enough to protect a manufacturer from undeserved liability.

In addition, the 25-year period (like all specific year periods) is entirely arbitrary. If the limitation period is based on the principle of useful safe life (as is suggested by earlier drafts), then the 25-year period is also illogical. Goods, especially capital goods, have widely varying lifetimes—some wear out faster than others. Moreover, a manufacturer may currently warrant machinery for more than 25 years. Such warranties will be a thing of the past if the 25 year period is adopted, for manufacturers will not want to increase their liability. Further, a provision such as this, which essentially allows manufacturers to produce machinery which can be dangerous after 25 years, eliminates some of the incentive to produce machinery which will last longer.

A more serious problem for users of the machinery is the possibility of a "slumbering defect" that does not manifest itself within the 25-year period. This may be either a negligent design which makes the machinery become dangerous as it grows older, or a case where a manufacturer's knowledge of a risk and thus the duty to warn of that risk, does not arise until after 25 years.

The final problem with the first alternative relates to its interpretation. This statute of repose applies only to capital goods, leaving consumer goods outside the scope of federal preemption. Presumably, the drafters intended that consumer goods not be covered by a statute of repose. Nevertheless, reading Section 12 in combination with the preemption language of Section 3, a state legislature could plausibly conclude that it is free to enact a statute of repose for consumer goods. Such statutes would obviously be challenged, but without federal courts to arbitrate only a Supreme Court grant of certiorari would ultimately resolve the issue. In the meantime, the intent of the drafters of S. 2631 would be frustrated, to the extreme detriment of consumers.

Alternative B clearly applies to all products, both capital goods and consumer goods. Instead of a complete bar to a claim, this section creates a presumption that a product is not unreasonably dangerous because of a design defect or failure to warn 10 years after the time of first sale. Five states now follow this approach, with the presumption beginning from 6 to 10 years after either sale or manufacture.

The presumption created by alternative B is rebuttable by clear and convincing evidence. One of the traditional reasons for a rebuttable presumption is to compel the party with superior access to the evidence to produce it. This presumption would turn that philosophy completely on its head. Although the manufacturer is in a better position to know of the existence of any defect, since he knows the product design, design process and their risks better than the user or consumer, it is the claimant who must prove defect, causation and injury. In an ordinary case this is what the claimant must prove anyway; with this presumption, however, he or she must prove these elements, not just by a preponderance, but by clear and convincing evidence. While this section does not on its face bar any claims, it may operate as a bar in fact given that the normal problems of proof concerning old products will be heightened by the clear and convincing evidence standard.

In addition, the 10-year period of this alternative is just as arbitrary and illogical as the 25-year period of the first. And the problem of a "slumbering defect" is even more critical in this alternative, since it applies to all products and allows manufacturers effectively to escape liability after a much shorter period. Simply put, whether as an absolute cut off or a super presumption, a statute of repose has no place in a fair and balanced set of product liability standards.

As regressive as these two alternatives are, we have heard rumors that certain groups will propose to broaden their coverage by eliminating the exceptions for fraud, concealment, long term exposure, and manifestation. Not only would such a move be a total outrage, it would decrease the likelihood that a federal statute of repose would pass constitutional muster. (Already, 10 state courts have struck down statutes of repose under state constitutional principles.) CFA urges the subcommittee to dispel these rumors by eliminating *any* reference to statutes of repose in S. 2631.

(2) Section 4(c) Alternative to Sindell rule

A more subtle but nevertheless potent bar to certain lawsuits is contained in the Section 4 requirement that plaintiffs prove that the product unit causing injury was manufactured by the defendant. The purpose of this provision is absolutely clear: It seeks to overturn legislatively the rule of law under which drug manufactures were held liable for the defective anti-miscarriage drug DES. Section 4(c) is intended to set up a process to substitute for the state law eliminated by the requirement of proof of manufacture. We fear that procedure may be so burdensome, However, as to remove most real hopes of recovery in situations like the *Sindell* v. *Abbott Laboratories* case from California and the *Bickler* case from New York.

In *Sindell*, the California Supreme Court recognized that, as a practical matter, it was next to impossible for the daughter of a woman given DES to identify the particular manufacture responsible: In most cases, drug companies manufacture the drug identically, which makes the problem of tracing a prescription back through the distribution chain insurmountable. Accordingly, the *Sindell* precedent will allow a plaintiff to proceed if she is suing manufacturers who controlled a substantial share of the market at the time her mother took DES. If the plaintiff prevails, the court will then apportion liability according to the market share controlled by each individual manufacturer.

While doctrinally offensive to many torts professors, this rule of law really amounts to an approximation of justice. Given the similarity of the drug as produced by different companies, there is substantial reason to believe that injuries to plaintiffs will be distributed roughly in proportion to manufacturers' market shares. And however approximate this solution may be, it is certianly more just than the alternative—allowing plaintiffs who can prove grievous injury to go uncompensated because industry-wide wrong doing cannot be attributed to each specific case of harm.

Under the approach of S. 2631, however, such industry-wide torts may create no liability, for plaintiffs will have a very difficult time meeting the heavy factual burden imposed by Section 4(c). We recognize that this section was drafted in a good faith attempt to strike a fair balance between the doctrinal and practical need to attribute responsibility to a specific defendant, and plaintiffs' strong interests in recovering where thousands have been harmed by an entire industry. But we fear that as a practical matter of trial practice Section 4(c) could shut out valid claims in *Sindell* situations.

Briefly, this Section requires plaintiffs to produce clear and convincing evidence on three separate issues: (1) that the plaintiff made every reasonable effort to establish the identity of the specific manufacturer; (2) that the plaintiff has brought his or her lawsuit against every manufacturer which could have produced the unit causing injury; and (3) that every manufacturer is in a better position than the plaintiff to establish who actually made the product. All three issues will involve substantial discovery time and costs, but the third is especially troubling. Since plaintiffs must carry the burden of proof, they will lose if neither victims nor manufacturers are in a position to establish the identity of the specific manufacturer. We believe that this last element of proof may ultimately doom many plaintiffs, since the *Sindell* rule never would have arisen if it were not very difficult to attach manufacturers to their specific products in certain cases.

We are also concerned about the impact of this three-part proof on the actual trial of product liability suits. Will this item be litigated as a threshold, with the judge ruling immediately on whether the case may progress? Or will the judge reserve decision and force plaintiffs to proceed with the rest of their trial before a decision on whether the burden of proof on Section 4(c) has been met? Finally, what if the judge rules against the plaintiff—Will he or she then be able to appeal immediately? Our guess is that these issues ultimately will receive a variety of different treatments from various state courts. We believe such disparity of treatment will combine with the tremendous burden of proof outlined above to discourage many valid claims. For that reason, while we appreciate the good faith that went into this provision, we feel it is insufficient.

STANDARDS OF LIABILITY

Perhaps the most important aspect of S. 2631 is the change it would trigger in the basic standards of tort liability applicable in design and warning cases. The Act eliminates the doctrine of strict liability in these cases, imposing substantial changes in the case law of the states.

As it stands today, the doctrine of strict liability—in its purest form—allows an injured plaintiff to recover if he or she is injured by a product rendered unreasonably dangerous by a defect in its design. The law therefore concentrates on the dangerous condition of the product—not the conduct of the defendant—and concludes that an innocent purchaser injured by a dangerous product should not bear the loss. Instead, the theory of strict liability holds that manufacturers responsible for designing defective products and injecting them into the stream of commerce are better able to bear the loss and should bear that loss as a necessary incentive for safe product design.

Yet while the label of this theory is strict liability, in practice it is not applied in such a way as to abandon the concept of fault. For in states that follow the Restatement 2d Section 402 A approach to strict liability, plaintiffs must prove the existence of an unreasonably dangerous defect in the product in question. The existence and proof of such a defect presumes—properly in most cases—that some sort of negligence created the dangerous condition of the product. So even pure strict liability contains a notion or presumption of fault by defendants.

It is absolutely crucial to recognize, however, that this pure form of strict liability is not really followed in most states. Instead, most commentators—even those most supportive of the current industry view—agree that strict liability in design and failure to warn cases in practice amounts to a negligence standard. The decisions announce strict liability but apply a negligence test.

Accordingly, the consistent refrain of industry lobbyists that the goal of this legislation is to move product liability law back to fault-based principles is not accurate. For, as the discussion above indicates, negligence-oriented fault is already part of the vast majority of state case law.

But that is not to say that S. 2631 makes no changes in design and warning cases, for the legisltation would have a fundamental impact on plaintiffs' ability to prosecute these cases. For design cases, the effect of S. 2631 is at least twofold.

First, the Act imposes on plaintiffs an extremely heavy burden of proof. At the outset, they must demonstrate that the defendant knew, or based on knowledge with sound support in the scientific, technical or medical community, should have known of the design danger giving rise to injuries. Then, claimants must also prove that a means to eliminate that danger was within "practical technological feasibilty." Finally, if as is common in design cases, the plaintiff offers an alternative design as part of his or her case, S. 2631 requires a very complex four-part test that plaintiffs must meet. That test includes proof that the defendant knew or should have known of the alternative design, proof of the sound scientific support for that design, proof of the overall safety improvement the alternative would produce, and proof that the alternative would have been "desirable, functionally, economically and otherwise to the user or consumer." The massive amounts of proof required by this Section could easily exhaust too many resources to justify bringing many valid claims. And, in many cases, Section 4(b) may severely limit a plaintiff's ability to utilize expert witnesses to meet this burden, deterring still more potentially valid lawsuits.

Second, the basic standard of liability for design is centered on an analysis of whether a reasonably prudent manufacturer would have used the design of the defendant in the same or similar circumstances. We fear that this standard will allow industry-wide negligence to escape liability, for juries will rarely conclude that an entire industry was acting unreasonably. If that is the case, then the liability standard will amount to little more than a weak state of the industry rule, with defendants able to fend off design suits with evidence of little more than "everybody designed it that way."

S. 2631's treatment of the basic standard governing warning liability is susceptible to a similar analysis. Section 6(b) forces plaintiffs through a difficult four-part proof that essentially requires them to design a warning and prove its adequacy. And again, most plaintiffs' ability to mount this proof will be hindered by the limitation on expert opinion referred to above.

Another troubling feature of the Act's duty to warn provisions is that manufacturers may avoid liability by warning an intermediate seller, employer or other person who could be expected to warn the worker or consumer. We are concerned that the legislation does not in all circumstances place a concomitant duty on these middle men to follow through with warnings. If it does not, then a worker or consumer injured as a result of a defective warning could find himself/herself in the position of having a valid claim but no actionable defendant. If this is not the intent of the drafters, then a clarification may be necessary.

Even if the Act does create a duty to warn for intermediate sellers and employers, their financial condition may as a practical matter make that duty irrelevant. These potential defendants are less likely than manufacturers to be able to satisfy major liability judgments. In cases where they cannot, we suggest that the Act revive the plaintiff's claim against the manufacturer. This provision could be drafted in much the same manner as Section 8(f), which allows plaintiffs to sue sellers or distributors when manufacturers cannot satisfy a judgment against them.

STANDARDS OF PROOF

(1) Collateral estoppel

Section 4(d)(1) and 5(d)(1) effectively eliminate the offensive use of collateral estoppel, which today can remove from plaintiffs the need to prove crucial facts which have already been proven in prior litigation. Before collateral estoppel is applicable, however, a judge must determine that an issue of fact has been fully and fairly litigated so as to work no hardship against the defendant; the doctrine is used only when a defendent can be said to have had his day in court concerning an issue of fact. The virtual destruction of the doctrine by the Act will force plaintiffs to spend a great deal of time and money relitigating facts. Defendants, on the other hand, will be able to experiment with different approaches, evidence and tactics in each trial until they find a winning combination. We believe the current collateral estoppel standard—which commits the fairness of the doctrine in individual circumstances to the discretion of the court—is a better treatment of facts common to several suits.

(2) Expert opinion

The legislation creates another issue of proof that I mentioned previously which threatens to work a real hardship on plaintiffs. Section 4(b) renders expert opinion insufficient by itself to meet a plaintiff's "preponderance of the evidence" standard of proof. These provisions require plaintiffs to introduce sound objective evidence to corroborate or support expert witnesses.

Because injured workers and consumers—unlike many defending manufacturers—often have little or no access to back-up design, engineering and technical data in complex cases, expert opinion is critical. It is our view that sufficient safeguards presently exist to ensure that plaintiffs' expert opinion is not over-valued by juries. After all, judges assess experts' qualifications prior to their testimony and instruct juries on the ultimate issues of liability and how they relate to proof offered at trial. In addition, defendants may always seek to overturn a verdict based on insufficient expert evidence through a motion for new trial or judgment N.O.V., or by taking an appeal. In addition, we question why the Act creates no corresponding limitation on defendants' use of expert witnesses on issues for which they bear the burden of proof.

(3) Subsequent remedial measures

Section 14 prohibits the introduction of evidence of subsequent remedial measures to prove liability, reversing the case law in a substantial minority of jurisdictions. The theory for allowing such evidence is set out in *Ault* v. *International Harvester Co.*, 528 p.2d 1148 (Cal 1974):

"The contemporary corporate mass producer of goods, the normal products liability defendant, manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggest that such a producer will forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image, simply because evidence of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement."

We did not take a position on the status of subsequent remedial measures during hearings on Staff Draft II. Now, however, given the near oppressive burdens of proof imposed on plaintiffs by S. 2631, we believe evidence of post-manufacture improvements should be allowed into evidence. Facing large burdens of proof—and in many cases without expert opinion to assist them—plaintiffs under a statute like S. 2631 will need every kind of evidence available in order to have a fighting chance.

DEFENSES

(1) Liability of wholesalers and retailers

Generally, Section 8 of the bill allows product sellers to escape from liability where they have breached no duty of care, reversing case law imposing strict liability on sellers essentially for public policy reasons. In a real sense, then, S. 2631 provides wholesalers and retailers with a defense in most of the product liability cases in which they are involved. We have some questions about the impact of this provision on product inspections and the overall level of product safety, since when liability is imposed on middle men in a chain of distribution they use their collective influence to affect the product safety decisions of manufacturers. Nevertheless, we recognize the costs and basic unfairness to sellers of being joined in suits where their actions played no role in creating injury or liability. As long as victim protection provisions similar to 8(f) exist, our objections to the overall concept behind Section 8 are muted ones.

We have more strenuous objections to Section 8(e)(2), which appears to provide a blanket shield for sellers concerning prepackaged goods. As a matter of statutory interpretation, it appears that 8(e)(2) overrides the more general Section 8 standards governing sellers' duty of care. If that is the case, then a seller would never be required to open a prepackaged product, no matter how much notice he had of potential serious injury to purchasers of that product. If our reading of this Section is correct 8(e)(2) is totally inappropriate and should be dropped.

(2) Alteration/misuse

The alteration/misuse defense in the Act also creates a potential problem. Section 10(b)(1)(c) relieves manufacturers from their duty to warn if the harm to the plaintiff results from alterations or modifications which do not constitute "reasonably anticipated conduct on the part of the product user." The current common law employs what appears to be a different test, inquiring whether misuse or alteration is "foreseeable." We believe foreseeability should be the touchstone of liability. If the drafters intended reasonably anticipated conduct to correspond to foreseeability, they should make it more explicit.

(3) Elimination of compliance with Government standards defense

S. 2631, unlike Staff Drafts 1 and 2, provides no evidentiary presumption for products that meet government standards. CFA has always believed that such a presumption makes neither legal nor public policy sense, and we are therefore pleased that is not a part of this bill. We urge members to resist attempts to add any such provision at a later date.

PUNITIVE DAMAGES

Our greatest concern about the Act's standards for awarding punitive damages is that such damages will as a practical matter no longer be applicable to corporations. Section 13(a)(2) explicitly exempts negligent choices among alternative product designs made in the ordinary course of business from the triggering definition of "reckless disregard." Consequently, no matter how inappropriate such a decision may prove to be—and no matter how dangerous the product that emerges from that decision—the defendant will not face punitive damages.

In addition, Section 13 appears to exempt from punitive damages any instances of corporate recklessness on an industry-wide basis. This exemption is created by the language requiring punitive damages to be based only on an "extreme departure from accepted practice." We believe that these restrictions are not justified by past abuses of punitive damages and that the factors contained in Sections 13(b) and 13(c) provide sufficient safeguards against unreasonable awards.

CONCLUSION

Mr. Chairman, this is perhaps the most inappropriate time to restrict the rights of injured consumers and workers. The recent attack on the federal regulation of product safety and the resulting cuts in the Consumer Product Safety Commission budget mean inevitably that victims of dangerous products will be forced to turn to the courts more than in the past. Accordingly, we believe that the proposed Product Liability Act—in its present form—is a move in the wrong direction.

Having said that, let me express our concern for the legitimate problems of small manufacturers with liability premiums and large damage judgements. We believe many of these problems are real and cry out for a solution. We pledge our willingness to work with you and the Committee staff to develop solutions in the areas of tax and financial incentives for safety, implementation of risk retention plans and high risk pools, and alternative compensation systems outside the courts.

Ultimately, however, we do not believe that changing liability rules is the answer—not for manufacturers and assuredly not for the consumers and workers who are harmed by dangerous products. For the latter, our most fundamental notions of justice demand liability standards which elevate safety to its highest feasible level and, when that is insufficient to prevent wrongful harm, compensation for all injuries present and future.

Consumer Federation of America thanks the Subcommittee for this opportunity to testify.

Senator KASTEN. Mr. Greenberg, thank you.

As the members of the panel are aware, and a number of others are aware, this is an area in which we have had the most difficulty trying to work out a compromise that was reasonable and responsible. I guess we ended up either pleasing no one or pleasing everyone, because not one of the panelists is completely happy with the middle ground that we have outlined in the bill before you.

Mr. Ford, your statement suggests that the statute of repose provision in our bill provides an exception to manufacturer's fraud which is too broad. Are you suggesting, for example, that if a drug manufacturer receives a license from the FDA to market a drug, and if that license were based on fraudulent test data, that the drug manufacturer would not be liable if it concealed that fraud beyond a certain number of years?

Mr. **Ford**. The manufacturer would be in so many other kinds of trouble if he had done that. I would think that possibly it should not affect the repose period that would otherwise be applicable. A crime against the U.S. Government would be prosecuted. I do not think that the remedy should lie in the product liability law. The remedy against that person is criminal.

Senator **Kasten**. But you feel, then, that the fraud issue is adequately covered in other parts of the law and does not need to be addressed in the product liability tort reform effort?

Mr. **Ford**. Yes, Senator. The manufacturer would be subject to liability up to the point where the cutoff occurs, which under our proposal would be 15 years. So, in your case, there is 15 years of exposure by the drug company. The drug company is not exonerated by our proposal: Rather, it is only after the expiration of a reasonable period, which we suggest to be 15 years, that there would be no further liability.

Senator **Kasten**. Mr. Goetz, you said in your testimony, "Moreover, exceptions from the bar can be made for what are believed to be more compelling cases such as the exemption for fraud in the present bill."

Am I to understand that you believe that the coverage of fraud in the present bill is needed?

Mr. **Goetz**. We have no objection to that clause in the bill, Senator.

Senator **Kasten**. Mr. Greenberg, could you comment in this general area?

Mr. **Greenberg**. Senator Kasten, the suggestion that fraud not be covered, or that there should be any time limitation for fraud is absolutely incredible. What that means is irrespective of the fact that a drug manufacturer would be prosecuted, or irrespective of the fact that FDA might act, there could be thousands of victims out there grievously injured by that fraud, but they would have no claim after the time period ran out. So to make an exception for fraud is absolutely demanded by any fundamental notion of justice, and I simply cannot believe that the Uniform Product Liability Coalition means what it says, and I hope that they will back away from that statement.

Senator **Kasten**. Well, I do not want to turn this into an adversary relationship, but I think it is important to explore these particular points.

Mr. Ford, you are an attorney, and it is my understanding that you are also a member of the American Bar Association [ABA].

Mr. **Ford**. I am not a member of the ABA.

Senator **Kasten**. You are not a member of the bar association. Mr. Lund, are you a member of the bar association?

Mr. **Lund**. I am, sir.

Senator **Kasten**. Mr. Ford, you are accompanied by——

Mr. **Forrest**. My name is William Forrest, general counsel of A. H. Robins Co., Inc., I am a member of the ABA.

Senator **Kasten**. It is my understanding, and possibly Mr. Goetz and Mr. Lund can respond to this; Mr. Sevier of the American Bar Association stated in March that his organization, the ABA, opposed the uniform product liability law.

Mr. Ford or Mr. Goetz or Mr. Lund, are you aware of any actions taken by the ABA which show that there are sections of the ABA that now support Federal product liability reform?

Mr. Ford?

Mr. **Ford**. Yes, I am familiar with the fact that there is substantial opposition within the ABA to the position taken in March. I understand that the ABA will reconsider its position in August at a meeting of its house of delegates.

Senator **Kasten**. Mr. Lund, would you comment on that?

Mr. **Lund**. That is essentially my understanding, that there are strong feelings on the part of many members of the bar that the action of the ABA was unrepresentative, and they have heard a great deal from members of the bar who disagree with them, and my understanding is that it will be reconsidered.

I did not put any date to that, but I had understood that it was under reconsideration at this time and it would be rather formally reconsidered at some date.

Senator **Kasten**. Thank you.

Mr. Ford, I do not understand the logic of creating a time-certain statute of repose for a harm that does not manifest itself for a long, unknown period of time. For example, let me just continue. Where harm is caused by a drug, the effects of which do not show up for perhaps 30 years or more, do you believe—or I should say it the other way. Why do you believe that there should be an absolute time limit cutting off the right to sue?

Mr. **Ford**. In order to make risks manageable. That is the very situation which is the most important because liability builds up over decades during which the condition is not known to either the user or to the manufacturer. This makes it impossible for a manufacturer to manage his risks, to know what his liabilities are, and to continue viably his business. That is the case which as far as I am concerned most urgently requires repose.

The idea of strict liability, as I understand it, was based on the concept that the manufacturer had superior knowledge and was better able to manage the risk. In the light of hindsight, it is now shown that in many situations—and one of them is the situation you just posited—that both of those assumptions are incorrect.

Senator **Kasten**. Mr. Goetz, Mr. Bendorf in his prepared testimony stated that the proponents of this bill should call themselves the National Association for the Protection of Producers of Defective Products, and I think you have heard that comment before.

Do you feel that your corporation is trying to escape liability for products that are not properly designed?

Mr. GOETZ. Quite the contrary, Senator. I have not been on the firing line since yesterday, being under deposition all day yesterday in Cincinnati. We build quality products. The only thing that we are asking for is some degree of certainty for planning. We do not expect to escape any responsibility or liability. We think our products, if there is any problem within a product, within 10 years it is going to show up. We do not anticipate escaping any liability.

I would also like to make one comment if I may, sir. In Mr. Greenberg's statement he had indicated that 93 or 97 percent of all claims occurred within the 5-year life of the product. That is absolutely incorrect with respect to the capital goods. I can only address from the experience of my company. Sixty-seven percent of our claims are involving products over 5 years, only 23 percent, 5 years and younger. That is totally inconsistent with what our experience has been.

Senator KASTEN. Mr. Goetz, do you have statistics that would take us out to 10 years or 20 years as well?

Mr. GOETZ. Yes, sir, I do.

Senator KASTEN. My understanding is that the numbers drop significantly out a little bit further than that.

Mr. GOETZ. That they do, sir. Our records would reflect that.

Senator KASTEN. Mr. Greenberg, I just want to make the point that we do not mean to override State law in the consumer products area, and we do not mean to, in any way, affect the consumer products area. I understand, if I listened to your testimony properly, you put a couple of different sections together and suggested that they could be interpreted by some States, under certain circumstances, to imply that that is our intention.

I would just like to say that I think we can work with the committee staff to simply put in a line that it is not the intention of this legislation to affect consumer products. I appreciate your suggestion.

Mr. Goetz, do you feel that the cost of product liability insurance and some of the associated costs and risk, and we discussed this with some people on the panel in March, have caused your firm to either be less enthusiastic about developing new product lines or in fact avoid getting into new or improved product lines completely?

Mr. GOETZ. It has been a challenge. When your costs run $10,000 per machine simply for insurance, you have a problem. Or from another standpoint, they are running 7.7 percent of sales in 1982.

Senator KASTEN. Your costs for insurance were 7.7 percent of your sales?

Mr. GOETZ. That is the projected costs for 1982, 7.7 percent of sales. It has affected our ability to either look at new products or new companies, and I can cite one specific example of when we wanted to broaden our product line. We had gone to direct marketing. In order to more effectively utilize our marketing capabilities, we were going to broaden our product line. We looked at a small company, very successful company, privately held, a very proud owner for many, many years, building machinery. When we looked at that company it was my recommendation that we not touch them simply because of the extensive product line that they have out in the field, and it was my judgment that in all probability the potential liability was greater than any assets we would pick up. We did not buy that company for that reason. And they were financially strapped and looking for help. And I do not know what has happened to them.

Senator KASTEN. Mr. Goetz, were you concerned about the product liability problem that you might have with the products that they have already manufactured that are presently on the market, or were you concerned about the product liabilities that you might encounter with the products that would have been manufactured?

Mr. GOETZ. We were concerned, sir, about the products already in the field, in essence, the product liability exposure that would come to our company through the acquisition of that other company.

Senator KASTEN. You said that your product liability insurance costs were roughly 7.7 percent of sales. This would be for this year as it is projected.

Mr. GOETZ. That is projected.

Senator KASTEN. Could you give us a sense of how that compares to last year or 3 years ago? Is it increasing or decreasing, and at what kind of a rate?

Mr. GOETZ. I should have brought more statistics with me. If you would like, I would get them. Last year it was 3.3 percent. That I do recall. We had been—let's see, that would have been 1981; 1979 and 1980 we were around 2, 2½ percent.

Senator KASTEN. While your product liability insurance has gone up from 3.3 percent of sales, to 7.7 percent of sales, have your sales increased or decreased during that time?

Mr. GOETZ. There are a couple of reasons for that, and they bear explanation, and yet they are valid.

The economy is down. Our sales are down. The costs have not gone down as far as product liability exposure is concerned because the machines are out in the field and the exposure is there. So those costs in 1982 have to be borne by far fewer sales dollars than there were in 1981. So that is one major factor.

Another major factor is we have changed our direction on insurance. We are doing some heavy funding in order to get a better control over our insurance program to see if that will help us in the long run.

Senator KASTEN. Based on your experience with other manufacturers and industry groups, is your experience typical or atypical of the industry.

Mr. GOETZ. Within the capital goods industry—and I guess I should qualify that—specifically within the machine tool industry, it is reasonably typical. I would have to say that our experience of going to 7.7 percent in 1982 is a little excessive to some extent because it was brought about by our change in the direction of insurance coverage or insurance programming. But at the same time, our competitors have experienced a similar turndown in business. So their costs that will be fixed for 1982 will also have to be borne by fewer sales dollars. So in that sense I would say it is somewhat typical.

Senator KASTEN. I do not know what kind of figures you reported, but do you have any idea, as a percent of sales, what your profits were for 1981 or what your profits will be for 1982? It seems to me that your percent of sales for product liability insurance might be a good deal greater than the percent of sales for profits.

Mr. GOETZ. I would expect it is, sir, but I do not have that knowledge. It is a closely held company.

Senator KASTEN. Mr. Goetz, thank you. And I would like to thank all of the members of this panel. It is my understanding that Mr. Greenberg will stay on to respond to questions in the next panel. I would like to ask Mr. Babcock and Mr. Humphrey to come forward and join Mr. Greenberg.

Our first witness on this panel is Mr. Charles Babcock, representing the National Association of Manufacturers. He is the attorney in charge of product liability litigation for the General Motors Corp. Mr. Babcock.

STATEMENTS OF CHARLES BABCOCK, NATIONAL ASSOCIATION OF MANUFACTURERS, ATTORNEY, PRODUCT LIABILITY LITIGATION, GENERAL MOTORS CORP.; AND DELBY HUMPHREY, PRESIDENT, SCHUTT MANUFACTURING CO., ACCOMPANIED BY MARIA DENNISON, DIRECTOR, WASHINGTON OPERATIONS, SPORTING GOODS MANUFACTURERS ASSOCIATION

Mr. BABCOCK. Thank you, Senator, good morning. Today I am privileged to come before you on behalf of the NAM. I am a graduate of the Harvard Law School, and I have practiced exclusively in the product liability litigation field for the past 11 years.

Your staff is tough on time, as it should be, and we can all see that clock up there, so I want to go directly to the area of design, sir.

At a meeting in Milwaukee earlier this month on June 4, Senator, at which you were the luncheon speaker, we all discussed this subject. You may recall that Mrs. Myrtle Feldmann of Sheboygan Falls, whose company makes products and sells them in several States, spoke. I think she impressed all of us as an astute businessperson.

I want to imagine, if I may, Mrs. Feldmann or Mr. Humphrey here, as they set out to make design choices, as our small business company people do virtually every day. When they ask what the law is, here is the legal advice.

A manufacturer whose product design is attacked in the courts of 41 States, including Wisconsin, will have the design declared illegal if it causes the product to be in a defective condition, sometimes also unreasonably dangerous, even though the designers back in Wisconsin exercised all possible care in their work.

There, Mrs. Feldmann. In seven other States there are rules similar to that one, but no more clear. And the remaining two States have yet to announce any rule in this area.

But there also are some more rules that our Wisconsin businesperson will want to keep in mind as he or she tries to make legal product design choices.

A product scrutinized in an Arizona court should have its design found adequate if the design conformed with the technical, mechanical and scientific knowledge of designing in existence and reasonably feasible for use at the time the product left the Wisconsin plant.

The same product will be illegal in Georgia if its design caused it to be not merchantable and reasonably suited to the use intended. The same design will be legally sufficient in Indiana if the methods, standards or techniques of designing the product were applied in conformity with the generally recognized state of the art at the time the product left Wisconsin.

In Nebraska, the same design will be all right if the product incorporated what was generally recognized to be the best prevailing technology reasonably available at the time the product left the Nebraska selling dealer.

In California, the same design can be found illegal if, in hindsight, the product failed to perform as safely as an ordinary consumer would expect.

And in Pennsylvania, the same design will be found illegal if the product lacked any element necessary to make it safe.

Now there, Mrs. Feldmann and Mr. Humphrey, there are a few laws for you. Design your products. Let Senators decide whether those rules are clear and stable and reasonable.

Surely the most fundamental failure to which any legal system is subject occurs, as here, where every case is a special case and there are no comprehensible general rules at all, ones that can be understood in advance and then followed by those whose conduct is to be subject to them. Under the current situation, manufacturers face bewildering, ambiguous and inconsistent rules that make product design a veritable guessing game.

S. 2631 is intended to bring order and clarity out of 20 years of confusion in this design area in a way that benefits all in the stream of commerce, including consumers, for it is they, as Professor Henderson has reminded us today, who foot the bill for our inconsistent and unintelligible rules of law.

One of the artificial dichotomies that unnecessarily polarizes these debates in our view and impedes desirable national progress is that between so-called businesspersons and so-called consumers. First, we are all consumers, and second, the consumers, all of us, surely need those who are to be bound by our rules—in this case, manufacturers—to understand what the rules are, in order that they can comply with them in advance, before products are designed, to the benefit of us all.

This subcommittee, this Senator and this staff are to be commended for countless hours of work extending over the past several months leading to this thoughtful bill. Thank you, sir.

[The statement follows:]

STATEMENT OF CHARLES BABCOCK, ATTORNEY, PRODUCT LIABILITY LITIGATION, GENERAL MOTORS CORP., ON BEHALF OF NATIONAL ASSOCIATION OF MANUFACTURERS

Good morning, Mr. Chairman, Members of the Subcommittee. My name is Charles Babcock. I am a practicing lawyer from Michigan. Today I am privileged to come before you as a member of the Product Liability & Employee Compensation Systems Committee of the National Association of Manufacturers and its Product Liability Legal Task Force. I am Attorney-in-Charge of Product Liability Litigation for General Motors Corporation. My practice has been exclusively in the product liability field for the past eleven years.

The National Association of Manufacturers is a diverse association of small and large manufacturers. NAM represents approximately 12,000 member companies, 80 percent of which are small businesses. NAM also has an affiliation with an additional 158,000 businesses through its Associations Department and the National Industrial Council. NAM members manufacture almost every conceivable product line and produce approximately 75 percent of the nation's industrial output.

Before I begin comments on the substantive aspects of S. 2631, I would like to take this opportunity to express our appreciation to you and your staff. Your hours of studying the problem and evaluating the proposed solutions have brought us further along the legislative road than at any other time in the Congressional history of this issue.

The National Association of Manufacturers urges the 97th Congress to enact fair and equitable product liability reform legislation which balances the rights and obligations of all those affected by it. NAM strongly supports the concepts of federal legislation embodied in S. 2631 and the working drafts that preceded it.

Nearly twenty years ago, American state courts undertook deliberately to change product liability law in a way urged by a number of distinguished American legal scholars.

The new concept, which soon came to be called "strict liability," was simple and compelling. Why, its proponents argued, should a person injured because of a poorly-made product have to prove precisely where in the manufacturing process something went wrong? That traditional "negligence" rule seemed to make progressively less sense in a modern industrial society. The sellers knew their complex manufacturing processes, while the consumers did not. And, the poorly-made product was obvious for all to see, for one had only to compare it with otherwise identical units from the same product line to learn of the deviation. Why not, they asked, look directly at the product in question, and require the injured claimant to show only that it fell below its manufacturer's own specifications and, of course, that the flaw caused the consumer's injury? And so it was that this new concept came to be adopted, in essentially the same form, in state after state, until the rule became American law.

The original rule of strict liability was and is capable of being understood by business persons, and the NAM is not here today to criticize this classic, original rule.

Like many reforms, however, this one succeeded in its original purpose but then led to other problems, ones that now require correction. This is the obvious purpose of the bill that is our principal subject in these hearings.

Not long after the implementation of the original strict liability concept in cases involving poorly manufactured products, the courts were asked to decide whether the new rule would be applied to cases involving the design of the products, that is, those where the claim is that the product was manufactured properly, but to poor specifications. In this area, the original harmony quickly became hopeless and confusing dissonance. Instead of one rule in the state courts, we have many. The business person, anxious to comply with the law and thus to design products lawfully, today faces the following rules of law, among others. Imagine a lawyer like me attempting to advise a business person in, let us say, Wisconsin, whose products are sold in many states.

Here is the advise. A manufacturer whose product design is attacked in the courts of 41 states, including Wisconsin, will have the design declared illegal if it casuese the product to be in a defective condition, sometimes also unreasonably dangerous, even though the designers back in Wisconsin exercised all possible care in their work.

In seven other states there are rules that are quite similar to that one, but no more clear for the business person who must make product design decisions.

The remaining two states have yet to announce any rule in this area.

Now, there are also some more rules that our Wisconsin business person will want to keep in mind as he or she tries to make legal product design decisions.

A product scrutinized in an Arizona court should have its design found adequate if the design conformed with the "technical, mechanical and scientific knowledge of designing in existence and reasonably feasible for use at the time" the product left the Wisconsin plant.

The same product will be illegal in Georgia if its design caused it to be not "merchantable" and "reasonably suited to the use intended."

The same design will be legally sufficient in Indiana if the "methods, standards or techniques of designing" the product "were applied in conformity with the generally recognized state of the art at the time" the product left Wisconsin.

In Nebraska, the same design will be all right if the product incorporated what was "generally recognized" to be the "best prevailing technology reasonably available" at the time the product left the Nebraska selling dealer.

In California, the same design can be found illegal if, in hindsight, the product "failed to perform as safely as an ordinary consumer would expect."

In Pennsylvania, the same design will be found illegal if the product lacked any element necessary to make it safe.

Simply let the business person tell his or her product designers about any one of these rules—never mind them all—and then see whether designers can understand the conduct that is required of them.

Surely the most fundamental failure to which any legal system is subject occurs, as here, where every case is a special case and there are no comprehensible general rules at all, ones that can be understood in advance and then followed by those whose conduct is to be subject to them. Under the current situation, manufacturers face bewildering, ambiguous, inconsistent rules that make product design a veritable guessing game.

S. 2631 is intended to bring order and clarity out of twenty years of confusion in this design area in a way that benefits all in the stream of commerce, including consumers, for it is they who foot the bill for our inconsistent and unintelligible rules of law.

One of the artificial dichotomies that has unnecessarily polarized these debates and impeded desirable national progress is that between so-called "business" persons and "consumers." First, we are all consumers, and second, consumers surely need those who are to be bound by the rules—in this case, manufacturers—to understand what the rules are, in order that they can comply with them, in advance, before products are designed, to the benefit of us all.

There are parts of the bill with which the NAM would differ, of course.

We would urge, first, that certain language from Staff Working Draft Number Two that is not in the bill be reinstated.

These areas are:

In Section 2, the "manifested by a substantial objective symptom" language in the definition of "harm"; the "adequately demonstrated" language in the definition of "practical technology feasibility".

In Section 4, the rejection of the Sindell concept of industry-wide liability.

In Section 5, the concept, in design cases, that there should be no liability for obvious dangers in a product, which appeared at page 9, lines 20 to 25, of the Second Staff Working Draft.

The entire section that appeared in Staff Working Drafts One and Two dealing with the relevance of compliance with government standards or government contract specifications has been omitted and should, in our view, be reinstated as follows: the subsection on compliance with government standards that appeared in Staff Working Draft Number One should be reinstated, with the slight changes suggested by the NAM last December. The subsection on government contract specifications that appeared in Staff Working Draft Two, language that entirely corrected certain problems with the version of that subsection that appeared in the First Draft, should be reinstated. The results would be practical and fair for all concerned.

In addition to these omitted areas that were part of the Second Draft, the NAM suggests consideration of the following points;

Of the two alternative sections numbered Section 12 in the bill, the NAM prefers the first. Our reason may be found in the section title, which in the case of each alternative is "Time Limitation on Liability." The title is well taken. There should be reasonable and fair time limitations, so that extreme cases involving very old "capital good" products with distant, irretrievable design histories may be avoided. The second version provides no time limitations at all, but rather permits these extreme cases to be brought, save only that a term sure to be vague and unclear to the triers of fact, "presumption," is to be employed during each trial. Within the first alternative, however, we urge that the relevant period be shorter than 25 years. NAM previously suggested that 15 years would be fair.

Section 13 of the bill, Punitive Damages, would be clearer if the term "reckless disregard" were eliminated in favor of the incorporation of the definition of that term in subsection (a)(2) into subsection (a)(1). This would result in a subsection (a), with no further division.

In conclusion, federal product liability reform involves no unwarranted intrusion into the common law that we all revere. For us to go from many different sets of vague rules to one reasonably balanced, fair and efficient federal law will constitute significant national progress.

This Committee and its Chairman are to be commended for S. 2631 and the months of earnest effort that preceded its introduction. Thank you.

Senator KASTEN. Mr. Babcock, thank you.

Our next testimony will be from Mr. Delby Humphrey, who is the chairman of the board of Schutt Manufacturing Co. in Litchfield, Ill. I understand, Mr. Humphrey, that you are accompanied by Ms. Maria Dennison, director of Washington operations for SGMA. Mr. Humphrey?

Mr. HUMPHREY. Senator Kasten, thank you for inviting me to appear before your subcommittee. It is indeed a privilege to have the opportunity to express my company's point of view on such a serious problem as product liability.

I sincerely hope that the Senate will act on S. 2631 this session. A small business like mine needs uniform guidelines to cope with the deluge of product liability challenges from trial lawyers birddogging this country's high school football files in an effort to locate injuries that would have lawsuit possibilities.

On a personal note, I am extremely pleased to see that Senator Richard Lugar and Senator Charles Percy have joined you as cosponsors of this important legislation.

My company is located in Litchfield, Ill. My home State is Indiana where I live. Senator, today we have heard the positions of big business, lawyers, consumers, activists, and capital goods manufacturers. In contrast, I am a small businessman and have been as an owner of a company for more than 20 years. My company, Schutt Manufacturing, produces consumer goods; namely, faceguard masks for football helmets, basketball goals, and ball inflaters. My product liability problems are strictly with faceguard masks.

My company is in a desperate situation now with the possibility of our insurance carrier refusing to pay claims from 1977 onward as they are suspended from writing liability coverage. If damages are awarded for more than $300,000 on a 12-year-old case we are presently litigating, I am out of business. I have never failed, in all my years, to pay all bills, but things are fast changing.

On the surface, this appears to be an insurance problem. However, the culprits of both the insurance companies and our predicament are the outlandish and unrealistic suits of trial lawyers who are making themselves millionaires because of the tenor of recent court decisions invoking strict liability.

From 1975 through 1982, my company has been involved in 12 lawsuits. In two of these suits, that have been settled out of court, we were found not liable. We paid transaction costs, however, amounting to $20,000. Of the remaining 10 cases, another 4 have been settled out of court.

A case in Florida asked for $5 million. They settled for $580,000. Our costs amounted to $10,000 in deductible, and approximately $8,000 in expenses. A case in New Jersey sued for $50 million. The injured player settled for $287,000. The plaintiff's lawyers in this case received 50 percent of the award. And in Louisiana, an award for the same injury amounted to $478,000, while the plaintiff's lawyer received, again, almost 50 percent. Our expenses in this case amounted to $21,000, and our insurance contribution was $25,000.

The remaining four cases have not been settled. Of those, one involves an injury in 1971. To date, our insurance company has spent $300,000 and our expenses are running to more than $20,000. That is, this year.

If we lose this case and are liable for more than $300,000, I can start laying off my people and begin selling my machinery. Eleven years have elapsed since this injury occurred, and we are a third-party defendant whose entire business could be up for sale.

Our expenses involving the three remaining cases amount to more than $9,000, and it has been less than a year since we have been notified of the suit. One suit alone is for $15 million.

As I mentioned, we manufacture a component part that has not been proved defective. Yet, with strict liability interpretations, we are made to pay.

Senator, unlike larger companies, we cannot spread risk. We are facing a situation in which dealers are now refusing to handle our product out of fear, and only 6 of 13 football helmet manufacturers remain in business. With all facing dire economic straits as a result of excessive and unwarranted product liability suits.

The time for deciding the fate of football in America is at hand. The sport will not survive the tremendous financial pressures imposed upon it by today's litigation. Football is the financial backbone of intercollegiate and interscholastic competition. It provides upwards of 75 percent of the funding for all school sports.

Throughout the years, the public has accepted the fact that playing contact sports can cause injury. The incidents of such circumstances have been so minute, considering the huge participation, that we are litigating football into extinction.

Senator, my product is not manufactured to protect the head and neck; it is produced to protect the face. Yet, I am being sued for head and neck injuries. In fact, I have been involved in two suits where my insurance company and myself have been made to pay for failure to warn.

I have a sheet here. This warranty is very difficult with a faceguard. There is no way that you can hang a warning on the guard itself, and for the person that is going to wear the guard to receive this warning.

If you have been in the football business and have been working on a guard for 50 years and it all started at Purdue University years ago, and we have never put a product on the market since then but what was field tested and used a year before we offered it for sale. At one time, we practically had a monopoly and do have yet today on the steel wire guards.

But on this warning, we have a warning in our literature, but it is something that is very seldom seen by the user because we sell our products through the helmet manufacturers. The helmet manufacturers place the guards on at the factory and more so today than ever, because the dealers are becoming alarmed, and they think they may be relieved of any pressure if they don't touch that guard. They have the factory put it on for them and ship it out ready to go.

So that really—you know, we understand it and tell them that it doesn't change a thing. I don't think there is a person in this room—is there one person in this room that feels that football is not a contact game and there is a chance that accidents can happen.

And I would be the first to say that we would probably never be able to do away with every accident, but I would also tell you that we have got the paraplegics and the fatality accidents practically down to nothing. I think last year it was seven paraplegics and two fatalities. I could talk here all day on statistics. It is your children that just go home after school, your boys. They are safer. They are not as safe as the boys out there in football equipment, according to the records. There are more of them killed on the way home than that.

The situation presently for my company and our customers is one where Taiwanese are now manufacturing faceguards almost identical to mine. It is identical, I would say. They are selling at questionable insurance coverage and selling it for half the price because of product liability. They are cutting it in half of what we have to get for our product.

My distributors have already been approached by them, and if they should agree to buy the Taiwanese product and not mine, a U.S. company that sells approximately 400,000 faceguards a year with sales revenues of about $1 million and who employs on the average of 30 workers, will find themselves out of business.

Senator KASTEN. Your time is about to expire. If you can just conclude your testimony in the next 30 or 40 seconds that would be fine.

Mr. HUMPHREY. I cannot take the risk of hiring more people or developing new or more products. Thank you, Mr. Chairman. I will be happy to respond to any questions.

[The statements follow:]

STATEMENT OF DELBY C. HUMPHREY, PRESIDENT, SCHUTT MANUFACTURING CO.

Senator Kasten, thank you for inviting me to appear before your subcommittee; it is indeed a privilege to have the opportunity to express my company's point of view before so distinguished an audience on such a serious problem as product liability. I would like to compliment the SGMA who have been leading the fight for tort reform for 10 years since spearheading the formation of the multi-association action committees which comprised 3,000,000 business leaders. I sincerely hope the Senate will act on S. 2631 this session. Small businesses like mine need uniform guidelines to cope with the deluge of product liability challenges from the trial lawyers, who are bird-dogging this country's high school football files in an effort to locate past injuries that would have lawsuit possibilities. On a personal note, I am extremely pleased to see that Senator Richard Lugar and Senator Charles Percy have joined you as co-sponsors of this important legislation. My company is located in Litchfield, Illinois and my homestate is Indiana.

Senator, today we have heard the problems of big business and those who manufacture capital goods. In contrast, I'm a small businessman, and have been, as owner of a company for more than 20 years. My company, Schutt Manufacturing, produces consumer goods, namely face guard masks for football helmets, basketball goals and rebounders, and ball inflators. My product liability problems are strictly with face guard masks. Now, I'm not just another company administrator, I've been responsible for new product development for about 50 years in the sporting goods industry. As a member of the Sporting Goods Manufacturers Association, I've been involved with the product liability problem for nearly 10 years. In face guards, alone, I have 4 U.S. patents and 2 Canadian patents, as well as 3 face guard trademarks. I am one of the very few manufacturers elected to an honorary membership in the National Athletic Trainers Association; and in 1971, I was elected into the Indiana Hall of Fame. I list some of these credits to establish my credibility as a witness before you here today, as one who knows from where he speaks.

My company is in a desperate situation now, with the possibility of our insurance carrier refusing to pay claims from 1977 on, as they are suspended from writing liability coverage. From 1969 through 1977, we were covered on a claims basis with a different insurance company. We were convinced to change carriers in 1977, and be covered on an occurrence basis, paying retroactive fees of $146,822 from March 1977 through April 1979, and $122,567 in premiums from April 1979 through August 1980, on a $500,000 policy with a $2,000,000 umbrella. In 1981, our insurance premiums adjusted to approximately $38,000 on a basic policy of $500,000 with a $5,000,000 umbrella. From 1969 to 1977, our coverage protects us up to $200,000 with premiums costing at that time about $300–$500 for product liability. If damages are awarded for more than this amount with a present suit we are litigating, we are out of business. As you can see, there has been no predictability in insurance rate-making. The rate system is based on the expectations of what is going to be paid in the future to cover the policy in force. The problem arises principally because of the state of confusion in the law.

On the surface this appears to be an insurance problem. However, the culprits of both the insurance company's and our predicament are the outlandish and unrealistic suits of trial lawyers who are making themselves millionaires because of the tenor of recent court decisions invoking strict liability.

From 1975 through 1982, my company has been involved in 12 lawsuits. In 2 of the suits that have been settled out-of-court, we were found not liable. We paid transaction costs, however, amounting to $20,000. Of the remaining 10, another 4 have been settled out-of-court. A case in Florida asked for $5 million. They settled for $580,000. Our costs amounted to $10,000 in deductible and approximately $8,000 in expenses. A case in New Jersey sued for $50 million. The injured player settled for $287,000. Our insurance contributed $50,000 and our expenses totalled about $16,000. The plaintiff's lawyer in this case received 50 percent of the award. And in Louisiana, an award for the same injury amounted to $478,000, with the plaintiff's lawyer receiving again almost 50 percent. Our expenses in this case amounted to $21,000 and our insurance contribution was $25,000.

The remaining 4 cases have not been settled. Of those, one involves an injury in 1971, where we had only $200,000 in coverage. To date, our insurance company has spent $300,000 and our expenses are running to more than $20,000. If we lose this case, the sky is the limit in what we may have to pay. Eleven years have lapsed since this injury occurred; we are a third party defendant whose entire business rests in the hands of the jury.

Our expenses involving the three remaining cases amount to more than $9,000, and it has been less than a year since we have been notified of the claimants intent to sue. One suit, alone, is for $15 million. As I previously mentioned, we manufacture a component part that is not at fault in any of these cases. Yet with strict liability interpretations, we are made to pay.

Senator, we are a small business. Unlike larger companies, we can't spread risk. In addition, our product is one that is a component part of a football helmet. We have been involved in suits where 66 defendants have been named. We are facing a situation in which dealers are refusing to handle our product and only 6 of 13 football helmet manufacturers remain in business, with all facing dire economic straits as a result of excessive and unwarranted product liability suits. The time for deciding the fate of football in America is at hand. The sport will not survive the tremendous financial pressures imposed upon it by today's litigation. Football is the financial backbone of intercollegiate and interscholastic competition. It provides up to 75 percent of the funding for all interscholastic sports activities.

Throughout the years, the public has accepted the fact that playing contact sports such as football can cause injury. The incidence of such circumstances have been so minute, considering the huge participation, yet we are litigating football into extinction. The effect of this system is grossly unfair to both the manufacturer and others in the commercial chain, and to the injured player himself. For example, of 11 cases tried in 1981, the injured player prevailed 5 times obtaining verdicts of $19.8 million. Six permanently paralyzed players received nothing at the hands of their jury. Some 11 players settled their cases for a total in excess of 3 million dollars. Insurers for helmet manufacturers have paid or are faced with paying over $18.3 million for this period alone. In addition, the insurance industry simply will not stand for the resulting loss ratio.

Industry estimates are that the total premium paid by the helmet manufacturers is approximately 2.5 million dollars per year. The cost of defending the suits brought, disregarding paying the judgements and settlements, eats up the premium. Unfortunately, the solution is not safer protective equipment. I can cite medical evidence that concludes that the head and neck injury rate has been reduced as much as can be expected.

Senator, my product is not manufactured to protect the head and neck. It is produced to protect the face. Yet, I am being sued for injuries to the neck and brain. In fact, I have been involved in two suits were my insurance company and myself have been made to pay for "failure to warn". The "duty to warn" became law some years after the accidents involving these suits occurred. In addition, it is very difficult to include warnings on face guard masks. It is highly unlikely the warning we carry inside our package is ever seen by the end-user. The faceguard mask is distributed to football helmet manufacturers or to dealers or athletic trainers who attach it to a helmet. I believe it would be logical to assume that since the game of football involves risk, the danger is obvious. Yet so many of us are having to pay not because of design or product defect, but because of failure to warn. I believe the provisions in section 5 and section 6 help alleviate manufacturers being "Monday morning quarterbacked" in litigation. In addition, the sporting goods industry applauds the "state of the art" provisions which require that products be judged by the standards accepted at the time they were manufactured rather than at the time the accident occurred. The effect requires proof of manufacturer's negligence. Section 9 on comparative responsibility would go far in discouraging plaintiff's attorneys from filing nuisance and frivolous suits which cost the small businessman a great deal over the long run.

I basically am for State control of most things and I do not like too much Federal control, I would like to see it cut back. This particular case and some others similar to it, however, require uniform legislation rather than the indiscriminate expansion of the tort system with the whims of local parties. It is obviously impossible for a manufacturer to conform to fifty different types of legislation on product standards or fifty types of exposure to interpretations of what a product should be able to do. As you can see from some of the suits I've mentioned, claimant injuries are not limited to one State. Obviously, the more uniform anything can be that is involving interstate commerce, the better for all parties concerned.

Each of these provisions would help insure the consumer of the availability of product at a competitive cost while also assuring their legal rights. The situation, at present for my company, Senator, and for that of consumers, is one where the Taiwanese are now manufacturing a face guard almost identical to mine, whose coverage is questionable, and selling it for half the cost. Because of product liability costs, we cannot be as competitive. The effect of product liability costs crosses over to international trade considerations. It has been said that every billion dollars worth of trade represents 40,000 jobs. My distributors have already been approached by the Taiwanese. If they should agree to buy the Taiwanese product and not mine, a U.S. company that sells approximately 400,000 face guard masks a year with sales revenues about $1 million and who employs on the average 30 workers, will find itself out of business. There are two scenarios that strict liability in tort will force upon manufacturers and consumers alike, as it realtes to my specific industry and company. One is that the demand for gigantic damages for real or imagined injury will force American face mask and football helmet manufacturers out of business, whereby consumers will have to depend on a foreign company to satisfy demand, or even a person manufacturing out of a garage with none of the built-in safety innovations in design that companies have spent years researching and developing. Or two, that sports in America will no longer be basic to the educational process as you and I know it today. There is a move in many school districts to eliminate high risk sports. As I mentioned earlier, football gate receipts provide for 75 percent of the funding of all interscholastic sports. In eliminating football, you eliminate tennis, golf, swimming, basketball, etc. and to consumers dependent on foreign-made products, I say good luck in ever collecting damages for injuries.

If I have any disappointments with the bill, it is with the statute of limitations clause. Sporting goods products are listed as high risk products, not because they are likely to be defective but because they attract lawsuits by the nature of the activity involved. The need to establish a statute of limitations for such consumer goods becomes an absolute necessity in order to provide a workable budget for product liability. The proposal would take away the plaintiff's advantages under strict liability after a certain number of years, but the plaintiff would retain a cause of action in negligence which avoids the possibility of all claims being barred before the accident occurs.

Mr. Chairman, I am frightened. I am seventy-six years old and am looking at the possibility of everything I have worked to build be destroyed by a judicial system out of balance. It is disconcerting that the criminals of our society receive very tender punishments, while the producers of our society are meted judgements that reflect revenge, not justice. Your bill is very important to all of us in that it will outline manufacturers obligations and responsibilities and consumers legal rights. It will provide a guideline for the courts in their consideration of the complexity of products and the business system. Fault must be restored to the system so that equity may prevail. I urge the full committee's consideration of this urgent legislation and strongly hope that the House will begin its consideration of a products liability bill.

Mr. Chairman, this concludes my statement. I would be happy to answer any questions at this time.

STATEMENT OF MARIA DENNISON, DIRECTOR, WASHINGTON OPERATIONS, SPORTING GOODS MANUFACTURERS ASSOCIATION

Mr. CHAIRMAN. The Sporting Goods Manufacturers Association is pleased to submit its statement for the record in support of S. 2631. Along with our affiliate organizations, we have 3,200 members. Approximately $16 billion of our products are sold annually. During the past seven years, strict liability in tort decisions by Federal and State courts have been sending a lava flow of litigation towards our industry's equipment manufacturers. These actions have placed many small manufacturing operations out of business, while forcing larger companies to liquidate certain product lines.

Judicial expansion theories of liability have brought manufacturers to the status of insurer. Yet the sporting goods industry, being composed of small sub-segments, cannot afford the risk in self-insuring or pooling together. For our industry, it is imperative that we stem the spectre of bankruptcy caused by unwarranted product liability suits through a legislative remedy that does not create inequities and hardships on either the manufacturer or consumer. If we do not accomplish this goal, we risk changing the social fabric of our Nation.

If manufacturers continue to be held responsible for any adverse effect of their products in the face of no negligence on their part and negligence on the part of the consumer, then rising product costs will result. If innovation must be slowed because manufacturers have been made wary of unforeseeable consumer hazards in the use of their new products, there will be the consequent slowing down of new job creation and income growth.

At present, Senator, these two "IFs" become realities, and our foreign competitors are reaping the benefits.

A balance between the right of defendants and plaintiffs can be struck through passage of S. 2631. The state of the art and comparative responsibility provisions within S. 2631 are constructive reforms that will help restore fairness to the system. The SGMA strongly recommends that the Senate move quickly to pre-exempt the conflicting morass of State product liability laws. A State-by-State solution would not work because the jurisdictions with the most liberal laws would not be affected. Manufacturers would have to gear their products insurance and prices to those States, in effect imposing those standards on citizens of other States. This proposition, however, is unworkable: (1) Insurance rates are set nationally; (2) companies sell their products across the country; meeting different laws in 50 different States would impede interstate commerce.

It is impossible for a sporting goods manufacturer to look into a crystal ball and insulate athletes from risk that they knowingly assume. The specific allocation of responsibility to any individual in the stream of commerce without a clearly defined responsibility for the injury caused, threatens the continued existence of such enterprise.

The sporting goods industry is very competitive, and accordingly, profit margins have never been great. In fact, last year, the percentage of net profit to sales was 1.4 percent. We see the resulting drop in profitability from 1974 onward primarily associated with the product liability crunch. Today, our product liability costs are 4.2 percent of sales, as compared to one-half of 1 percent for foreign competitors. The consumer bears these costs in increased prices, which make our products less competitive and our ability to stay in business less certain.

Out of the 13 football helmet manufacturers, 7 remain in business. Of these 7, only 1 company has publicly stated they will remain in business thru "thick and thin." Seventy-five severe cases relating to injuries on the football field are waiting to be tried. Profits from helmet and face mask manufacturers is no more than $1 million of gross sales of $25–35 million. The crisis is not that there are more accidents causing injury and damage. As a matter of fact, reports are to the contrary. The crisis is that the reward for injury has escalated dramatically. Results: Schools are dropping sports, manufacturers are dropping product lines (in some cases dropping out altogether), and retailers and sales agents are saying, "Wait a minute * * * I can lose everything just by being involved in the process?" Consumers are paying through increased prices, lost programs and services.

Since football supports a good piece of the athletic budget in the more than 15,000 high schools and 3,000 colleges around the Nation, we must conclude that without a new source of funding a good portion of the entire athletic program in schools is in question. This is not a hyperbole, this is an economic fact. Astonishingly, all this comes at a time when serious football injuries are down 55 percent the last decade according to Dr. Voight Hodgson, Wayne State University, an acknowledged expert on such matters. However, football is not the only sport that is sustaining direct frontal attack by the plaintiff bar. Hockey, skiing, camping and many others are also under attack. These attacks on entire industries will continue to escalate monthly to unprecedented levels until solutions are enacted. Success breeds success * * * and the plaintiff attorneys are enriched and encouraged not only by victories in court, but outright capitulation by the defense in an astounding number of out-of-court settlements.

The sporting goods manufacturers are linking hands with other groups so threatened to give strength to the case for the type of Federal bill you have introduced Mr. Chairman. The tort system is difficult to rectify when the opposition, whose knowledge of the law, ability of expression and admitted mastery of elastic revelation have their finger in the dike of revision.

The patterns and numbers of injury for contact sports have decreased significantly over the last 20 years principally because of manufacturers—the vast amount of money and research they have expended to make accidents, an infrequent by-product of sports experiences, as least traumatic as possible. Reports from the Journal of the American Medical Association and the National Collegiate Association Committee on Competitive Safeguards and Medical Aspects of Sports will document these claims. Unfounded suits produce a psyche that makes the manufacturer extremely hesitant to introduce new products whose technological efficiencies make greater contributions to the safety of sports.

Mr. Chairman, the SGMA membership have been working steadfastly for nearly 10 years to encourage legislation such as S. 2631. During the course of that time we have testified before numerous Senate and House committees, presenting anecdotal and economic evidence for our case. We see your bill as an outline for the State and Federal courts to use in interpreting tort law. Given the multiplicity of different State statutes and in many cases, no guidelines, S. 2631 is a great step in treating the injured fairly and equally; the guilty firmly but equitably; and the innocent * * * well * * * just leave them alone.

We would be remiss in not stating that while excessive product liability challenges in our industry primarily affect equipment manufacturers, it also affects other market segments.

To quote one of our manufacturers: "Our company, a manufacturer of athletic clothing which is used in conjunction with headgear, such as football helmets, shoulder pads, etc., is in favor of S. 2631, as anything that affects their production will indirectly affect our industry. As a company which employs 200 people and contributes substantially to the tax base of our community, we join in supporting the 'Product Liability Act.'"

The ramifications of unwarranted product liability suits extends beyond a single manufacturer and a single industry. We are interdependent on the need for raw materials and component parts. In addition, our ability to stay in business affects our distibutors and dealers ability to remain viable. Lastly, high damage awards based on the principal that manufacturers are a deep pocket and someone must pay, are forcing the elimination of junior varsity sports, and in some cases, the elimination of football, baseball, wrestling, and hockey at the high school level.

Are we intent on destroying school sports in America because of judicial interpretations applying the thinking that "where there is an injury there is a remedy," in lieu of "where there is a right, there is a remedy?"

I am sure all of us in this country would support the latter statement, and not out of greed, destroy that which has made this Nation great.

Mr. Chairman, the sporting goods industry produces instruments of action. For the most part, men, women, and children purchase our products with the intent of being active, aggressive and competitive. The Department of Education lists more than 56 million school aged children participating in school sports programs, with about 30 million active in sports outside the school arena. With the present imbalances in the scales of justice in the product liability arena it is an open question as to how long our manufacturers, mostly small businesses, will be able to fulfill those recreational needs and demands. The risk of sport as a business has become greater than the sport itself.

For nearly 10 years, the SGMA has spearheaded business efforts to advance fair and reasonable solutions to the product liability crisis. In 1977, we formed the Multi-Association Action Committee (MAAC) an ad hoc committee of 3 million businesses and members whose primary concern was the development of a Federal legislative remedy that would: (1) establish uniformity in the law; (2) provide a realistic statute of limitations defining liability for aging equipment, including provisions for state of the art design and/or materials as a legitimate defense; (3) reduce or cap punitive damage awards as a deterrent to future misconduct; and (4) limit contingency fees to prevent attorneys from becoming partners of the injured parties.

We urge the full committee's action in reporting out a bill that restores balance to product liability law. We appreciate the opportunity to comment, and we believe S. 2631 is a good faith effort at providing an equitable solution for all.

Senator KASTEN. Mr. Greenberg, would you like to comment on Mr. Babcock's testimony concerning varying State product liability laws for design defects?

Mr. GREENBERG. I would like to make a brief comment on Mr. Babcock's rendition.

I am sure that if he is a lawyer for General Motors he is a fine lawyer, but it seems to me that after listening to his testimony, he may be in the wrong career. I think we could take those couple of pages of testimony and set them to some snappy music and send them to Broadway. But I think his case is a little bit overstated.

And here is the reason why. If I was advising that manufacturer in Wisconsin and looked at all those State rules, I would not look at the specific statutory and case law language. I would look at what juries do. And I think it would be easily predictable, based on a couple of those standards, how you could design your product.

One very, very simple way would be to look at the State case law that requires the most safety and design your product to meet that law. You would not have to look at any other law. So I think that either by looking at the major trends in what juries actually do instead of looking at the actual words, or just by designing to the safest standard, you could eliminate that problem.

Senator KASTEN. Mr. Greenberg, looking at Mr. Humphrey's testimony, he didn't read all these numbers to us but he says:

> We are in a desperate situation now with the possibility of our insurance carrier refusing to pay claims from 1977 on. From 1969 through 1977 we were covered on a claims basis with a different insurance company. We were convinced to change carriers in 1977 and be covered on an occurrence basis, paying retroactive fees of $146,826 from March 1977 through April 1979, $122,567 in premiums from April 1979 through August of 1980 on a $500,000 policy with a $2 million umbrella.
>
> Then in 1981, insurance premiums adjusted to approximately $38,000 on a basic policy of only $500,000 with a $5 million umbrella. From 1969 to 1977, our coverage protects us up to $200,000 with premiums costing, at that time, about $300 to $500 for product liability. If damages are awarded for more than this amount with the present suit we are litigating, we are out of business. As you can see, there has been no predictability in insurance ratemaking.

From the point of view of the consumer, we look at these kinds of costs and recognize the problems. I do not understand the degree to which Mr. Humphrey is being sued for neck injuries or things that have nothing to do with the face. Don't we all recognize that there is clearly a problem here?

Mr. GREENBERG. There is clearly a problem in all those numbers you read to us about insurance rates. At your hearings in March, I made some intemperate remarks about the insurance companies that came back to me. I am not going to repeat them today.

But I think that the numbers you read and the situation of companies like Mr. Humphrey's suggests that we have to move ahead very quickly with ideas like the idea you put forward in the Risk Retention Act. We have got to get those plans going. We have got to make sure that people have an alternative in their product liability insurance coverage. And I think that is the only way to protect people against skyrocketing insurance rates and what has been shown to be irrational ratemaking practices.

I would like to make a couple of comments about the sort of suits that Mr. Humphrey mentioned that his company had been involved in. I think that no matter what sort of statute we have, no matter what sort of standards we have, someone can always get into court with a flimsy claim. And sometimes, if the defense feels that there is some settlement value to that and that a motion to dismiss that case cannot be won right away, they will do some settling, even on cases that are flimsy.

That is going to be true under the product liability statute. That is going to be true no matter what happens to case law, as long as a case turns ultimately on its facts and cannot be disposed of by a pretrial motion. We are going to be in court and there is going to be some transaction costs.

As far as the uncertainty goes, I think that if we enact a new product liability statute we are going to face years of uncertainty figuring out what all the terms mean, figuring out the whole new lexicon of product liability law. Each State is going to apply that law based on its own definitions of those words and based on its own biases. So I wish I had a recommendation for Mr. Humphrey and for companies like his, other than alternatives to the major product liability carriers, but I just do not.

Senator **Kasten**. Mr. Humphrey.

Mr. **Humphrey**. I would like to say that I appreciate your offer, but I believe if you can tell me how to slow down these trial lawyers going in and finding where somebody has been injured several years ahead and just now—you know, they always wait until it is almost too late for them to bring it out and the statute has been running out its limit.

But what happens then, they come in there and they bring in all the family and they put on a great big act and they carry it on, and then they ask such large figures that it forces—then they realize that if there were any way in the world that you could put certain limitations—in other words, if a player was injured and he would be allowed so many thousand dollars per month as long as he lives, and then there is a cash settlement at the end, perhaps.

But the way it is now the judge and the jury are settling everything more on sympathy than they are following what the law says or what it should say.

Senator **Kasten**. Mr. Babcock, I assume you believe that a Federal product liability law would bring more stability and predictability to this area of the law. How would you respond to Mr. Greenberg and others, who have said that even with this law we will continue to have uncertainty and a lack of predictability?

Mr. **Babcock**. Sure, I would like to do that, Senator. If I can continue to practice law at least until these hearings end this morning, Mr. Greenberg. We do not have court decisions interpreting the Kasten bill, because, of course, it is a bill. But, I believe I could advise Mr. Humphrey, under the bill, if the bill were enacted into law, I believe I could advise Mr. Humphrey and millions of Americans like him as follows:

First, Mr. Humphrey, we have 1 law that you have to abide by and not 50. Here is that law as it applies to your design of this thing right here, and you know a lot about that and I do not know anything. But here is the law.

A jury can decide that a design choice that you make for this product is unlawful if they decide that a reasonably careful manufacturer in your place when the product was designed would not have chosen this design as you did, and if they find that your company knew of the danger that harmed the claimant, the young man playing football, or that if it did not your company should have known about that danger, and that there was a readily available, economically feasible way in which your company could have eliminated that danger.

Now, your product design is not going to be declared unlawful because of dangers that you could not have eliminated from this thing without seriously impairing its effectiveness or its desirability to the people that, after all, you hope will buy it.

Frequently when you are sued in these cases it will be said that not only did you not make a reasonably careful design choice, but that you should have used some other alternate design. Well, it is not enough for someone suing you just to say that you should have done it some other way, because the design choice is just that, it is a choice. And there is almost always more than one way to design anything.

There are six safeguards built into the law to prevent this from being just a compensation system. Here they are: First of all, the jury needs to find that you knew about that alternate design when you made your product, or that you should have known about it;

Second, that the technology for that alternate design was there;

Third, that at the time it would have been practical and technically feasible for you to have made the product using that alternate design;

Fourth, that the alternate design would have provided better safety for this particular football player who got hurt; and not only that, but,

Fifth, that if your company actually had used that alternate design for the product, that that would not have exposed football players generally to more hazards from your products; and

Sixth, that consumers, the people you sell to, still would have been willing to buy your product if you had used that alternate design, because, for example, your product still would have worked satisfactorily and they still would have recognized it to be a good value.

Now, that is significant national progress, and your subcommittee is to be commended for that.

Senator **Kasten**. Mr. Babcock, are you a member of the American Bar Association?

Mr. **Babcock**. Yes, sir. I was amazed to learn this morning that my American Bar Association has opposed this bill. That is not right, is it? I think there are two or three sections maybe that have come out for it.

Senator **Kasten**. Mr. Sevier of the American Bar Association stated in March that his organization opposed uniform product liability law.

Do you know anything about the bar association position on this bill and if it is about to change.

Mr. **Babcock**. Senator, there are persons in the room, I believe, who have testified that are far more qualified than I to answer that. My understanding is that the American Bar Association as an association has yet to take a position on S. 2631. Professor Schwartz may have a comment that might be helpful to you.

Senator **Kasten**. Do you believe that a statute of repose should provide an absolute cutoff of liability without an exception for harm caused by the cumulative effect of a product? For example, the drug example we were talking about earlier.

Mr. **Babcock**. It seems unfair, does it not? I think that my little 3-year-old daughter, to give you a personal example—and if you want an emotional issue, I will give you one. Let us talk about that little girl that is going to wake me up tomorrow morning as the self-appointed family alarm clock.

Now, if that little girl is injured by a drug I am going to have a lot of trouble myself thinking that there should not be an action available. Having said that, it is our position that the bill as it stands is—in the first alternative, as our testimony indicates, is the preferable of the two.

Senator **Kasten**. So, you do not, then, believe that a statute of repose should provide for absolute cutoff of liability? Our bill does not provide that. You agree with our bill?

Mr. **Babcock**. Senator, we agree with your bill.

Senator **Kasten**. Mr. Babcock, thank you.

I would like to thank members of this panel, and Mr. Humphrey particularly. I think we can all relate to your experience. I am told you have a company with roughly 30 employees, is that correct?

Mr. **Humphrey**. Yes.

Senator **Kasten**. I would like to thank you all for being here.

Tomorrow we will have additional testimony on the question of product liability. This hearing is adjourned.

[Whereupon, at 11:40 a.m., the subcommittee was adjourned.]

PRODUCT LIABILITY REFORM

THURSDAY, JULY 1, 1982

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE FOR CONSUMERS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 235, Russell Senate Office Building, Hon. Bob Kasten (chairman of the subcommittee) presiding.

OPENING STATEMENT BY SENATOR KASTEN

Senator **KASTEN**. The committee will come to order.

Welcome to our second of 2 days of hearings on S. 2631, the Product Liability Act. At yesterday's hearing we heard testimony from a wide range of concerned individuals and organizations, including representatives of the manufacturing, consumer, and legal communities. We had, I think, a lively and illuminating discussion of the issues confronting the subcommittee. My perspective on the product liability problem was greatly enhanced, and I look forward to hearing from today's witnesses.

Again, we have a full schedule this morning. The topics to be explored include compliance with Government standards, punitive damages, and substantive remedial measures, along with a host of other issues.

Once more, each member of the panel will have an opportunity to make a 5-minute oral presentation. The hearing clerk will indicate when the time has expired. Following the presentations of all panel members, we will begin rounds of questions from members of the subcommittee. Witnesses should feel free to respond to questions directed at another panelist.

In addition, we will have a closing statement today and there may be statements from other members of the subcommittee.

Our first witness will be Mr. Robert Malott, who is chairman of the Business Roundtable's product liability task force. Mr. Malott.

STATEMENT OF ROBERT H. MALOTT, CHAIRMAN, PRODUCT LIABILITY TASK FORCE, BUSINESS ROUNDTABLE

Mr. **MALOTT**. Mr. Chairman, I am Robert H. Malott, chairman and chief executive officer of FMC Corp. As you indicated, I represent the Business Roundtable and its task force on product liability, which I chair.

The roundtable's task force was formed in October 1981 to help bring about an equitable reform of the product liability tort system. The task force consists of the chief executive officers of 12 member companies representing such varied industries as pharmaceutical manufacturers, chemical producers, automobile and diversified machinery manufacturers, as well as wholesale and retail distributors. A list of the task force members is attached to my statement.

The ability of a membership as diverse as ours to build consensus on the complex issues involved in product liability reform is to me compelling evidence of the importance the roundtable's membership attaches to this issue. In my statement this morning, I will briefly discuss the product liability problem, the need for Federal reform legislation, and the Business Roundtable's support for S. 2631.

The product liability problem we face today results from trends in court decisions in recent years that have made manufacturers even more liable, in my opinion unrealistically liable, for injuries associated with the use of their products. Two decades ago a manufacturer could know with reasonable certainty the standards that would be used in determining product liability. Over the last 10 to 15 years, however, the concept of liability has been relentlessly expanded by both State and Federal courts.

Although lawyers and legal scholars can explain to me on a case-by-case basis how the expansion of the concept has occurred, they cannot set out any standards that delineate where liability now begins and where it ends. Let me take a few moments to give you an idea of the length to which liability has been extended and how liability varies from State to State.

Traditionally, an individual injured while using a product was entitled to recover damages from the manufacturer if he or she could prove that the manufacturer's negligence was responsible for the injury. This negligence standard was widely perceived as fair to both business and the injured party.

About 20 years ago liability for damages was expanded to cover injuries or harm caused by a mechanically faulty product, even though the faulty condition did not stem from negligence on the manufacturer's part. Again, both the business community and society at large could agree that this concept of liability without fault, called strict liability, was equitable.

Now, however, companies may be liable if their products are judged to be defective because they are dangerous in use, notwithstanding the fact that the product may be in perfect mechanical condition. At issue is not whether the product is manufactured according to specifications, but whether its design poses a safety hazard.

However, there is no objective uniform standard which defines what constitutes hazardous design. Furthermore, there is no rational limit on the length of time a company may be liable for unsafe conditions associated with the use of its products. Companies may find out, as the Oliver Machinery Co. of Michigan did, that they may be sued for damages for an injury resulting from a 30-year-old machine. Thirty years after Oliver had built the machine, a table saw, a plaintiff asked a jury to rule that the saw's design was dangerous. Surely, any truly dangerous condition would have manifested itself many years earlier.

Manufacturers may also be liable today if they fail to attach warnings to their products. It does not matter that a product will be used only by trained personnel or that the hazard is obvious. My own company, FMC Corp., was found liable, for example, for injuries suffered by a construction worker when a heavy equipment operator maneuvered an FMC-built crane into a high voltage powerline—a rather obvious hazard.

In addition, under today's extended concept of liability companies may find themselves liable for injuries even though a user alters or misuses the product. The manufacturer's liability stems from his responsibility for any uses that may reasonably be foreseen. This doctrine requires that manufacturers either design products to prevent misuse or provide warnings of the dangers inherent in their misuse.

Again, however, there are no clear standards as to what constitutes foreseeable misuse. A few States have not only extended the concepts of liability, but have also changed the rules of the game, changed in ways that favor the plaintiff.

For example, courts in one State have permitted a plaintiff to introduce evidence that a manufacturer modified a product after an accident. This undoubtedly prejudiced the jury to assume that such modifications were made because the earlier model's design was unsafe.

Another example: Courts in two States have permitted plaintiffs in pharmaceutical cases to name a number of companies as defendants without identifying the company which made the particular lot of an allegedly injurious drug taken by the plaintiff.

Determinations of liability are complicated by the fact that product liability law is applied and developed on a case-by-case basis in the Federal courts and in each of the 50 States. Even if it were possible to define liability exposure in one State, businesses would still be unable to predict their liability in other States.

This lack of uniformity of liability exposure produces striking differences in judgments. For instance, shortly after an Illinois court ruled against FMC in the case of the crane which struck the highpower line, courts in two other States in similar cases ruled that crane manufacturers were not liable because the hazard of driving a steel boom into an electrical line is obvious. These kinds of variations in results are not equitable for either the manufacturer or injured parties.

The expansion of product liability exposure in the last two decades has gone too far. Far from being an equitable system for assigning liability for damages to a negligent party, the product liability system today is looking more and more like a business-financed compensation system for victims, one totally divorced from any concept of responsibility or negligence.

The implications of such a compensation system are higher costs for society as a whole, as the costs of large judgments will in fact be passed on to consumers. In addition, unpredictable product liability exposure is making manufacturers hesitant to introduce new products, retarding innovation and new product development, and ultimately retarding economic productivity as well.

To ameliorate this situation, clear and practical standards of liability must be developed. Some have suggested that new product liability standards should be enacted by the States. They argue that setting tort law standards is one of those powers reserved to the States under the tenth amendment to the Constitution. Under the States' rights theory, the Federal Government has had no role in this area in the past and should not have any role in the future.

In general, I am sympathetic to this argument. The more things that are administered at the State level the better. However, product liability tort reform is an appropriate issue for Federal action on both constitutional and practical grounds. Given that most products today are sold nationwide, the enormous and growing costs of liability judgments are sufficient grounds for Federal action under the Government's constitutional responsibility to regulate interstate commerce.

Federal product liability reform also makes good sense on practical grounds. We have already tried the State approach to reform and it has failed. Although 28 States have passed reform statutes, no two of these are alike. Instead of contributing to uniformity, these statutes have instead increased the diversity of standards.

Mr. Chairman, the Business Roundtable recommends the enactment of a Federal tort reform law on product liability. Your bill, S. 2631, the Product Liability Act, is on the right track. The bill is fair and balanced in its approach to the complex set of issues involved in product liability reform. It safeguards the rights of product users and consumers, while providing business with discernible standards, thus achieving the greatest benefit for society as a whole.

The fact that the bill has sponsors from both parties is further evidence of its balance and its equity. Mr. Chairman, the Business Roundtable strongly recommends that all parties interested in product liability reform focus on your bill, S. 2631, as a starting point for developing effective Federal reform law.

While the roundtable has a number of suggestions for improving your bill, and these will be submitted to you in detail next week, let me briefly mention four particularly important areas in which we feel the bill should be strengthened.

First, we recommend that S. 2631 establish a time limitation on liability that is applicable to all products and simple and clear in its operation. Both of the alternatives in our judgment in S. 2631 are too narrowly focused.

Second, we recommend establishing in S. 2631 limitations on the amount of punitive damages that may be awarded in a single action and the total amounts that may be awarded in multiple actions.

Third, we are concerned about liability suits against manufacturers of Government equipment. When a manufacturer builds products to Government specifications, it does not seem fair that it could be sued for damages on the grounds that the product's design, over which the manufacturer did not have final control, is excessively dangerous.

And fourth, we recommend putting back into S. 2631 provisions establishing a presumption that a product which complies with applicable Federal standards is reasonably safe. Claimants now can use the fact that a product fails to meet a Government standard as evidence of a dangerous condition. We believe the converse should be true as well. If a product is in compliance with Federal standards, then it ought to be presumed to be safe.

The roundtable task force will submit to the committee suggested language for amendments in each of these four areas. We stand ready to work with the committee in its consideration of proposed changes.

In closing, Mr. Chairman, the Business Roundtable urges all parties—industry, labor, consumers, the legal profession, and the administration—to work together to achieve agreement on a product liability reform bill that is so badly needed. We pledge to you, Mr. Chairman, our support for an effective reform measure based on S. 2631.

Senator **Kasten**. Mr. Malott, thank you very much, and thank you for your work and your testimony.

I would like, if I could, just because I think it is an example of two different problems, to explore this crane-powerline problem that you ran into. It is my understanding that in Illinois a court held that a crane manufacturer was liable.

Under what grounds could they assume that someone should not know that if a crane hit a powerline it could create a problem?

Mr. **Malott**. They felt that we should have had warning devices on the crane which, when the boom moved into proximity of a high-voltage line, it would either automatically shut the crane off or alert a sleepy driver that he was about to run into a powerline.

Now, at the time the crane was manufactured the technology that they thought we should be applying did not exist. So it was beyond the state of the art at the time we manufactured the crane. At the time the suit was brought, there had been some developments that would have allowed us, as we are currently doing, to incorporate those kinds of changes into our design. But at the time the crane was manufactured there was no technology that was capable of doing that.

Senator **Kasten**. And in the State of Illinois there was a jury award of $2.6 million, is that correct?

Mr. **Malott**. That is correct.

Senator **Kasten**. For one single accident?

Mr. **Malott**. One single accident.

Senator **Kasten**. Now, exactly the same circumstances at roughly the same time in two different States produced the opposite result?

Mr. **Malott**. I do not know exactly the relationship of time, whether they were at exactly the same time. But they followed that case, and the States I think are New Mexico and Minnesota, but I am not sure. But they were in effect about the same kind of cases. The crane operator drove a crane with a metal boom into a high-tension wire. And in both of those cases the courts found that to be an obvious hazard and did not feel that it created liability for the manufacturer.

Senator **Kasten**. Do you see any inconsistency between the Reagan administration's new federalism program, less Government, and the Federal liability reform that we are seeking in this legislation?

Mr. **Malott**. Absolutely none. I am fully aware of the administration's concern over centralization of Government in Washington and I think its objective of trying to decentralize and give more back to the States is appropriate. But it seems to me that a Federal law in this area creates no bureaucracy, it does not create a regulatory agency. There are none that exist now that would—whose power would be increased by a Federal statute.

The court systems that would be trying product liability cases would continue to be essentially State courts, some Federal courts. But Federal legislation would not move more cases from State to Federal jurisdictions. There are obviously—I think you have to compare an issue like this, which to me is so clearly a matter of the Government's obligation to regulate interstate commerce, with welfare programs and other programs which should be decentralized and administered more closely by people who both want the benefits and are able to pay for them.

So I see no conflict between this and what I understand is the administration's concept of new federalism.

Senator **Kasten**. Well, I am hopeful and I am optimistic that the administration, in a meeting which is likely to occur on or about July 15, will in fact take a position in favor of Federal product liability legislation. And we are trying to work with them.

I agree with you, I do not think it is inconsistent in any way. We want less government, not more. There is no cost, no bureaucracy, and what it is going to do is to reduce the cost to product sellers, manufacturers, and consumers.

With a couple of suggestions that you made toward the end, as I understood your testimony, you said that you believe that compliance with Government contract specifications should create an absolute defense in the case of a product liability action. That would be for a person who was a supplier or a Government contractor who meets those specifications.

Then, do you think there is a separate issue in terms of compliance with standards set by FDA or CPSC or whatever?

Mr. **Malott**. Right.

Senator **Kasten**. I would like to just concentrate on the first part, the Government contractor provision. Could you elaborate on your view of the Government contract provision and maybe give us an example of how the current system is inequitable?

Mr. **Malott**. Well, I do not necessarily mean to infer that the current system is inequitable. I think, though, that those of us who are in the business of supplying the Government ought to be protected. I foresee a creeping potential liability situation where Government contractors could be sued for manufacturing a product to the design specified by the Government.

If manufacturers have no control over design, they ought to be protected from liability based on faulty design. I am not saying that if we are negligent in producing a product we should not be liable.

Senator **Kasten**. You do not have an example, though, of a case in which Government specifications, Government design specifications, or even Government performance specifications, but especially Government design specifications, are in fact producing an unsafe design?

Mr. **Malott**. No; I am not inferring that Government design is inherently unsafe. I am just saying that those of us who are Government contractors, particularly in the development and manufacture of fairly complex systems, do not always control design. The Government controls it, and therefore it seems to me that we should not be held liable for design faults.

Senator **KASTEN**. Now, the other suggestion that you made was that a manufacturer could use as a defense the fact that they met Government standards.

Could you elaborate on that particular point as well?

Mr. **MALOTT**. Well, I just reiterate what I mentioned in my testimony, that currently claimants can use the fact that a product did not meet Government specifications in terms of supporting a case for liability. It seems to me that the converse should be true as well, and that is that if a defendant can prove that his products were designed to Government specifications that he could be presumed to have designed the product properly.

Again, I am not addressing the matter of negligence in manufacture. I am talking solely about design.

Senator **KASTEN**. Mr. Malott, thank you very much for your testimony and help this morning, also the testimony and help of the product liability task force. I look forward to working with you as we wrestle with these remaining problems. I think we have made a good deal of progress so far, and I look forward to continuing success. Thank you very much.

Mr. **MALOTT**. Thank you very much. As I have indicated, Mr. Chairman, the business community thinks this is a very important issue, and the roundtable and its task force and its membership is very anxious to work with you in any way to see that we get a Federal preemption law.

Senator **KASTEN**. Thank you very much.

Our next panel will include Mr. Eppel, Ms. Pequet, Mr. Owen, and Ms. Smith. We will begin with Mr. John Eppel, who is the assistant general counsel for Ford Motor Co., Dearborn, Mich. Mr. Eppel.

STATEMENTS OF JOHN P. EPPEL, ASSISTANT GENERAL COUNSEL, FORD MOTOR CO.; BARBARA K. PEQUET, LEGISLATIVE DIRECTOR, NATIONAL CONSUMERS LEAGUE; DAVID G. OWEN, SCHOOL OF LAW, UNIVERSITY OF SOUTH CAROLINA; AND MARIANNA S. SMITH, ASSOCIATE DEAN, AMERICAN UNIVERSITY LAW SCHOOL

Mr. **EPPEL**. Mr. Chairman, thank you.

My name is, for the record, John Eppel. I am an assistant general counsel, Ford Motor Co., chairman of the Product Liability Alliance Subcommittee on Government Standards, and a member of the Business Roundtable's Lawyers 'Advisory Committee.

I have closely followed the development of S. 2631, and I commend the chairman and the staff for their interest and hard work. Federal product liability law reform is critical, and this bill is an excellent effort.

At the request of the staff, however, my testimony is limited to the omission of any provision related to the role of Government safety standards or approvals in product litigation.

This committee has heard extensive testimony from other Members of Congress, manufacturers, product sellers, experienced counsel, and respected academics with regard to the need for substantial legislative Federal reform. A specific judicial call for Congressional attention, however, has now been ignored. In *Dawson* v. *Chrysler*, the Court of Appeals expressly directed Congress attention to unfair anomalies arising out of the role of Government standards in product litigation, and staff drafts 1 and 2, as you observed earlier, 1 and 2, were responsive to that call.

Now, as a general rule, courts have begun to recognize but for the most part have failed to deal with the fact that the design of a complex product such as a motor vehicle necessarily involves sophisticated tradeoffs between expected benefits and potential dangers and disadvantages. Indeed, the very purpose of the Motor Vehicle Safety Act, for example, is to enable NHTSA to make those judgments while emphasizing that safety must be, in the words of one court, "the overriding consideration in the issuance of standards."

NHTSA has the statutory mandate to eliminate unreasonable risks and in our experience the resources and expertise to objectively and knowledgeably make the necessary tradeoffs. Other Government agencies have, I understand, similar duties and capabilities. For example, the Food and Drug Administration is responsible for determining that a drug is safe and effective, and must balance known benefits of the drug against known and potential dangers.

In essence, when the Government establishes a standard regarding the safety, design, or performance of a particular aspect of a product, and I emphasize I am only talking about those aspects that are regulated, when it does that, it performs the same kind of analysis required of a jury under section 5 of your bill; that is, identification of unreasonable dangers.

However, the judgment of a jury in a single case is far less reliable. The jurors are not usually trained in product design, and indeed are chosen in part because of their lack of familiarity with the subject matter of a lawsuit. Moreover, a retrospective, case-by-case jury approach cannot be truly effective from the standpoint of the overall national interests, because the jury is specifically charged to focus only upon the facts in the case before it.

Where there are no applicable Government safety standards, the system must necessarily be accepted, and we believe, by the way, that other provisions of S. 2631 will substantially improve it. Where a Federal agency has passed judgment on the very issues raised by a lawsuit, however, there is no reason to believe that the jury should second-guess the expert administrative agency. In fact, such second-guessing may seriously disrupt the deliberate safety balance struck by the agency.

It is untenable for each of the 50 States to adopt on a case-by-case basis requirements that differ from those imposed by the Federal Government. Congress in the Safety Act, for example, acted wisely in 1966 when it prohibited State legislators and State regulators from establishing vehicle safety standards that are not identical to Federal standards. At that time, however, Congress did not foresee that individual juries would be allowed to impose requirements substantially different from those mandated by Federal regulation.

This is understandable in view of the fact that individual juries were not making such judgments at that time, and the concept of crashworthiness, so central to many Federal safety standards, had not emerged in litigation.

In summary, where a product is in compliance with the type of pervasive, stringent Government safety requirements applicable to drugs and motor vehicles, we believe that should be a complete defense to a product liability challenge to the regulated aspect of the product. Where regulation is not so pervasive, compliance should give rise to a prima facie defense, and in almost all conceivable instances should at the very least be an absolute bar to punitive claims.

To those who would suggest that the Government safety requirements are weak, ineffective, or the product of some undue influence, let me quote, for example, Dr. Robert Brenner, a frequent critic of the industry, an adversary in litigation, and a former NHTSA official who once testified that

> The safety built into vehicles sold in the United States is higher than ever before, and the highest in the world. The achievement is at once due to Federal involvement in setting safety standards and the capability of the auto industry to design and produce vehicles that meet the standards.

I suggest that if the litigation issues raised by Government safety standards and approvals are ignored in the bill, the result will continue to be, in the words of the Court of Appeals, "incoherence in the safety requirements set by disparate juries.", and that the true goals of predictability and uniformity in product liability law will substantially be undermined.

Mr. Chairman, I have a longer prepared statement which I would like entered into the record.

Senator **Kasten**. Your prepared statement will be made a part of the record, and I thank you very much for your testimony.

[The statement follows:]

Statement of John P. Eppel, Assistant General Counsel, Ford Motor Co.

Mr. Chairman and members of the subcommittee; my name is John Eppel. I am an Assistant General Counsel of Ford Motor Company, Chairman of the Product Liability Alliance Subcommittee on Government Standards, and a member of the Lawyers Advisory Committee for the Business Roundtable's Product Liability Task Force. In these capacities I have closely followed the development of S. 2631 and at this time I want to take the opportunity to express our appreciation for the hard work, interest and enthusiasm of the Chairman and the Staff of the Subcommittee.

Legislative product liability law reform is critical and, in general, this bill is an excellent effort. Nevertheless, there is one striking and disturbing difference between S. 2631 and the earlier drafts. I am concerned about the omission from the bill of any provision relating to the role of government safety standards in litigation, and it is this omission that I would like to address today.

This Committee has heard extensive testimony from other members of Congress, manufacturers, product sellers, experienced counsel and respected academics with regard to the need for federal product liability reform. As far as I am aware, however, the most specific and direct judicial call for congressional involvement has come in the area of government product safety requirements from the United States Court of Appeals for the Third Circuit, in *Dawson* v. *Chryseler Corp*. The Court of Appeals expressly directed Congress attention to the anomalous and unfair state of the law which permits individual juries to require specific levels of safety performance and design in the context of the peculiar facts of a particular case despite the fact that the jury's opinion might differ or conflict with those of expert government agencies.

The particular focus of the Court's concern in *Dawson* was its inability to deal with the system, set in motion by Congress, that limits the pre-emptive effect of federal motor vehicle safety standards in product liability cases, but the problem extends beyond that concern. Individual juries are now empowered to impose their notions of appropriate safety designs on manufacturers even though they may conflict with the obligations imposed by other juries in other cases, or with the safety, social and economic judgments reflected in federal safety standards or approvals.

Courts, in several instances, have recognized that the design of a complex product necessarily involves sophisticated trade-offs between expected benefits and potential dangers and disadvantages. In the main, however, the judicial system has been powerless to deal with the situation. In *Dawson,* for example, the plaintiff alleged that his injuries were aggravated because the frame of his vehicle was not rigid enough, yet as the court noted a more rigid frame could well have aggravated injuries in other types of accidents. Virtually every product design or formulation decision can present similar choices. For example, heavy and rigid bumpers or fenders may offer additional protection to engine components or fuel tanks but they may dangerously increase the peak forces of impact experienced by passengers. Brighter or higher intensity headlights may improve the driver's visibility, but they may also blind drivers in on-coming cars. Seats in a vehicle that remain rigidly anchored and fail to yield may aggravate injuries under some circumstances, while in other circumstances injuries may be more severe because the seats do give way. Compare *Seattle First Nat'l Bank* v. *Talbert,* 542 P.2d 774 (Wash. 1975) and *Baumgardner* v. *American Motors Corp.,* 522P. 2d 829 (Wash. 1974), with *Volkswagenwerk of America, Inc.,* v. *Young,* 321 A.2d 737 (Md. 1974), and *Walton* v. *Chrysler Corp.,* 229 So. 2d 568 (Miss. 1969). In some instances the theoretical benefits of a safety device, such as air brakes, may be outweighed by disadvantages such as lack of reliability. See *Paccar, Inc.* v. *National Highway Traffic Safety Administration,* 573 F. 2d 632 (9th Cir. 1978).

In the case of the National Highway Traffic and Motor Vehicle Safety Act (Safety Act), for example, its very purpose is to enable the National Highway Traffic & Safety Administration (NHTSA) to make the necessary trade-offs in a way that will meet the need for motor vehicle safety by protecting the public against unreasonable risk of harm. The Court of Appeals for the Ninth Circuit summarized the situation as follows:

"The purpose of the Act is to 'reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents.' 15 U.S.C. § 1381. '[S]afety shall be the overriding consideration in the issuance of standards * * *.' Each standard must meet the need for motor vehicle safety and must be stated in objective terms. 15 U.S.C. § 1392(a). The Secretary is instructed to consider 'available motor vehicle safety data, including the results of research, development, testing and evaluation activities conducted pursuant to this chapter. 15 U.S.C. § 1392(f)(1). A separate section requires the Secretary to carry out research and development, which can be done by grants to 'States, interstate agencies, and nonprofit institutions.' 15 U.S.C. § 1395 (a), (b). The Secretary is required to consider whether a standard is 'reasonable, practicable and appropriate for the particular type of motor vehicle' and 'will contribute to carrying out the purposes of this chapter.' 15 U.S.C. § 1392(f)." *Paccar, Inc.* v. *National Highway Traffic Safety Administration,* 573 F.2d 632, 635 (9th Cir. 1978) (footnotes omitted).

Thus, NHTSA has been directed to hold safety paramount, to establish reasonable, practicable standards based upon available safety data and to use the research and development resources granted to do the job. "Practicable" is defined in the Act to "require consideration of all relevant factors, including technological ability to achieve the goal of a particular standard as well as consideration of economic factors" H.R. Rep. No. 1776, 89th Cong., 2d Sess. 16 (1966). Pursuant to this directive, in the case of motor vehicles, for example, the government has employed numerous experts in the field of automotive design who are capable of making and who have, in many instances, made the complex and complicated judgments required of them in this regulatory format.

In our experience, NHTSA has the statutory mandate, the resources, and the expertise to make the necessary trade-offs objectively and knowledgeably, with safety being the primary consideration. Other government agencies have similar duties and capabilities. Before a new drug can be marketed, for example, the Food and Drug Administration must determine, after a lengthy testing procedure, that the drug is safe and effective. In determining the safety of the drug, the FDA must necessarily balance the known benefits of the drug against the known and presently unknown potential dangers.

In essence, when the government establishes a safety standard or approves the marketing of a new drug, it performs the same kind of analysis required of a jury under Section 5 of S. 2631 to determine whether a product is unreasonably dangerous. However, the judgment of a jury in a single case is far less reliable. First, of course, jurors are not usually trained to evaluate a product, and indeed are chosen in part because of their lack of familiarity with the subject matter of the lawsuit. Moreover, "[a] retrospective, case-by-case jury approach cannot be truly objective, from the standpoint of national interests, because the jury is specifically charged to focus only upon the facts in the case before it. The broader design picture cannot be fully appreciated because of the very nature of the proceeding. Moreover, the sympathy factor, the concept of a target defendant, the suspicion of insurance lurking in the background, and jurors' emotions are all factors which militate against a jury's truly objective consideration of crash design standards." Hoenig, Resolution of "Crashworthiness" Design Claims, 55 St. John's L.Rev. 633, 724 (1981)

Where no government standards have been adopted to cover the aspect of design involved, these imperfections in the jury system must necessarily be accepted. In those instances where a federal agency has passed judgment on the very issues raised by the lawsuit, however, there is no reason to believe that a jury is qualified to second guess the judgments and trade-offs already made by an expert administrative agency. In fact, such second guessing may seriously disrupt the deliberate balance struck by the agency.

"Whenever it is contended that a state's products liability rules require more than the federal standard itself requires, there is a danger that the safety agency's decision to set a limit upon the required level of performance in the interests of an overall safety compromise will be thwarted. For example, the federal standard's allowance of seat yielding, after a prescribed force load requirement is exceeded, may represent a safety judgment that other, more serious injuries might be sustained if the seat were made not to yield to forces exceeding the prescribed level." Hoenig, supra, at 712–13 n. 345.

The interests of free-flowing interstate commerce make it untenable for each of the 50 states to strike a different balance on imponderable choices like these through the adoption of non-identical design requirements that differ from those imposed by the federal government. Congress in the Safety Act, for example, acted wisely in prohibiting the states from establishing any vehicle safety standards that are not identical to the federal standard. While it prohibited state legislatures and administrative bodies from second-guessing the federal agencies, however, Congress did not foresee the possibility that individual juries would be allowed to impose requirements for product design that are substantially different from those mandated by federal regulations. This oversight is understandable in view of the fact that in 1966 when the Safety Act was passed, individual juries were not permitted to make such judgments and Congress had no reason to believe that product liability law would change so radically in subsequent years so as to give juries virtually unbridled discretion to rule on such issues. The concepts of design liability and strict liability were not nearly as well developed and, more important from the standpoint of motor vehicles, the concept of crashworthiness, or protection once an accident occurs, which is at the heart of many federal standards had not emerged in civil product liability litigation.

In summary, where a product is in compliance with the type of pervasive, stringent government safety requirements applicable to drugs and automobiles, that should be a complete defense to a common law product liability challenge to a regulated aspect of the product. Where regulation is not so pervasive, compliance with government safety requirements should give rise to a prima facie defense and, most certainly, compliance should in all conceivable instances be a bar to punitive damage claims.

Two arguments are commonly raised against giving special weight to compliance with government standards: first, that government standards are only minimums, and second, that the regulated industries exert undue influence over the government agency involved, resulting in unreasonably low standards. Such assertions are often made without adequate knowledge and background to assess the complex factors involved in the standards setting process. Nevertheless, these arguments may have some validity when applied to some regulations of some government agencies, but are they clearly inappropriate as a general indictment of government regulation. The arguments ignore, in our case for example, the fact that motor vehicle standards must, by law, meet the need for motor vehicle safety by eliminating all unreasonable risks of harm. Moreover, as noted safety must be the primary consideration in the adoption of such standards. FDA approval of a new drug is similarily dependent upon a determination that the drug is safe. Indeed, even frequent critics of government and industry safety performance have recognized the efficacy of certain government regulations. Dr. Robert Brenner, the president of the Institute for Safety Analysis, and a frequent witness for plaintiffs in litigation once testified before Congress that "[t]he safety built into the vehicles sold in the United States is higher than ever before, and the highest in the world. The achievement is at once due to federal involvement in setting safety standards, and the capability of the automotive industry to design and produce vehicles that meet the standards." [Testimony before Subcommittee on Consumer Protection and Finance, March 12, 1976.] More recently, in 1980 Joan Claybrook, former NHTSA Administrator, testified as follows: "The General Accounting Office has estimated that motor vehicle safety standards had, through 1974, saved at least 28,000 lives. We presently estimate that 55,000 lives have been saved through 1978." [Testimony before the House Transportation Subcommittee, February 27, 1980]. Any argument that government regulations such as these are ineffective inadequate or the product of undue influence is simply without any basis in fact.

I suggest to the Committee that the role of government safety standards must be addressed in product litigation reform. If the problem is ignored, the result will be continued "incoherence in the safety requirements set by disparate juries", and the true goals of predictability and uniformity in product liability law will substantially be undermined.

Senator **Kasten**. Our next witness on this panel is Barbara Pequet, legislative director of the National Consumers League.

Ms. **Pequet**. Good morning, Senator Kasten and staff. NCL is always pleased to appear before you to present our views on behalf of our members and our State affiliates on the product liability issue. NCL has been active in this area of product safety and product liability for several years. We have testified numerous times since 1977 on both product liability and risk retention laws.

Our interest in the effect of your bill dates back to our organization's early work starting at the turn of the century on worker and consumer health and safety measures.

Senator, you and your staff and subcommittee have been working for a number of months on this important product safety issue. Throughout this notably open process of arriving at a final bill, NCL's views and differences of opinion always have been clear. We have been opposed to a Federal products liability bill, and remain so today, on the grounds that it will be harmful to consumers and to the cause of safety, but we do appreciate the opportunity to register our opposition once again.

That opposition is pervasive. We believe S. 2631 to be one of the more drastic anticonsumer bills introduced this session. In historical terms alone, this legislation seeks radically to change the tort law system of the United States as it has evolved over the past century. The two pillars upholding citizens 'guarantees for safety in the marketplace are the regulatory agencies and laws, and the tort system. Given the current attack on regulations and the present emasculation of health and safety agencies, consumers can endure no weakening of tort law.

In terms of substance, we remain, as I said to you personally months ago, hard pressed to cite one pro-consumer measure or improvement in this bill over the current trends in case law. Since this process of developing the bill began last fall, there have been changes—most recently and notably the removal of the compliance with Government standards defense for business, but NCL, as I said, remains opposed to S. 2631 in its entirety.

However, a detailed discussion and list of those changes in areas of harm to consumers would run for pages and long minutes, so please allow me to present a synopsis of 12 points and reasons that we stand in opposition.

First, the changes proposed in this bill abrogate the very best purposes of the tort system, which is safety and effectiveness.

In the area of safety, one of the fundamental policies carried out in tort litigation is the theory that the responsibility for safety and the prevention of harm should be placed upon the party who is in the best position to prevent the injury. Consumers are often unable to prevent injury from defective products.

If safety and prevention were the policy goals of S. 2631, various measures would create a presumption that a product which injures the user is defective, and the manufacturer should have the burden to prove otherwise. Such a proof requirement would result in safer products by providing the greatest incentive for manufacturers who have that power to improve their products. In the words of Dean Prosser, "If a manufacturer is made liable for product defects, he will try to prevent the occurrence of such defects."

The proposed bill, however, favors the presumption that a manufacturer often should not be liable, even where a consumer has been harmed by a defective product. In several instances, the burden of proof is so difficult for the consumer to meet that the injured party will lose the suit even though it would be in the best interests of society to hold manufacturers liable.

In the area of effectiveness, another theory basic to the tort system's allocation of liability is the public policy of levying accident costs against the party best able to bear those costs. The tort system, for all its flaws, is effective in at least reimbursing the injured party, who could never be made whole. You cannot put arms back on and replace missing eyes.

In most instances, manufacturers are able to pass accident costs on to the purchasers of their products, or to add the accident costs to the general cost of doing business. If we look only at the manufacturer's losses the costs of going to court, the liability, and the cost of insurance, we lose sight of the fact that long-range costs will always fall on consumers, because manufacturers will have no incentive to develop a safer product.

Second, S. 2631 is more concerned with protecting manufacturers and suppliers than in arriving at an effective reparation system. This bill's approach to misuse, alteration, and modification is lopsidedly slanted against consumers. For example, in misuse, the Kasten bill would make defendants liable for injuries to the consumer only where a consumer's action could be deemed reasonably anticipated. Instead, we believe we should hold manufacturers responsible for injuries where their products are used in a foreseeable manner.

Third, this bill reduces safety to a dollar value and turns the courtroom into a forum for economists. The key concepts to define manufacturers' parameters in finding a means to eliminate danger or establishing an alternative design are hinged on the cost to manufacturers. The bottom line for the "practical technological feasibility" or the "unavoidably dangerous aspect" standards is the initial costs to manufacturers. It is possible under the wording of this bill that a hazardous product may be held not to be unreasonably dangerous, because any change which would both be improving the product but cost more, and no matter how little that cost, could be deemed therefore "economically undesirable," and the product would remain therefore unavoidably and permanently dangerous.

May I give you just a very quick synopsis of our remaining concerns?

Fourth, no Federal products liability bill will insure uniformity or stability in the tort system.

Fifth, a Federal products liability law rigidifies what needs to be flexible, responsive, and evolutionary.

Sixth, this bill seriously cuts back areas of protection and causes of action for consumers.

Seventh, the bill will increase delay in litigation. It will not streamline the process of coming to justice for unreasonably unsafe products.

Eighth, this bill makes it possible for manufacturers to completely escape liability, however culpable, in the two provisions affecting the *Sindell* case and the statutes of repose.

Ninth, the quality of goods and the expectation of their durability for consumers will be reduced as we have to accept a 10-year useful safe life statute, which implies that after 10 years every citizen will operate consumer products at their own risk. In fact this bill implies consumers right to be throwing away every household product that could possibly last longer than 10 years for fear of possible harm.

Tenth, information and the facts that support informed decisions for consumers, something so highly praised by this administration, will in fact be discouraged by this bill.

Eleventh, corporate recklessness in designing unsafe products will go unpunished under S. 2631 due to the punitive damages changes.

And finally, product sellers are encouraged under this bill to be lax about safety and unaccountable for unsafe goods.

Senator **KASTEN**. Thank you.

Ms. **PEQUET**. There are a number of suggestions that have not been discussed, suggestions which appeared in chapter 5 of the task force report, the legal study of the products liability situation. We would be more than willing to work with the subcommittee to implement any of those suggestions in order to address some of the problems that exist in the system.

Senator **KASTEN**. Our next panel member will be Prof. David Owen, who is from the school of law, University of South Carolina. Professor Owen.

Mr. **OWEN**. Good morning, Senator Kasten. I am pleased to be before you and your staff today to discuss the topic of punitive damages in products liability litigation.

As you indicated, I am a law professor at the University of South Carolina and also a member of the consulting law firm of Keeton, Owen & Henderson. I appear before you today, however, in my individual capacity as a law professor.

The first question on punitive damages is whether there really is a problem in need of solution. My studies on the topic of punitive damages in this area over the last several years have shown me that there are an increasing number of awards of punitive damages. Increasingly, appellate courts uphold these awards. The amounts of the awards are increasing in nearly geometric measure, and yet no legal principle seems to be guiding their evolution.

The problem then, in sum, seems to be that we have an increasing threat to the litigation system which is not guided by reasoned legal principle, and it is an effort in that regard that your bill seeks to improve the litigation process, and I think in many respects successfully.

The first basic problem, however, that I think needs to be underscored, is the problem of principle. Punitive damages are in effect quasi-criminal punishment, and so what is at issue is when society should in a quasi-criminally way punish its manufacturers for producing products.

And so when a wrongful punitive damages verdict falls upon the head of a manufacturer, at stake is not the question of whether an injured consumer should be compensated, because that consumer has already received full compensation for his injuries. The question then shifts to whether the manufacturer should be punished, and if indeed the manufacturer is innocent of the wrongdoing, or if a jury has no way to gage the guilt or innocence of the manufacturer, then the society is permitting an intolerable situation to exist.

Is the problem serious? Well, it was suggested in the testimony yesterday, Senator, that there are very few punitive damages verdicts around. That is not completely true. That was the situation in the mid-1970's, but since that time such claims themselves have been skyrocketing. Such verdicts have been increasing in numbers, and as I indicated earlier, the amounts have skyrocketed even to the extent that they have been approved on appeal.

For example, in the mid-1970's, when I first studied this issue, the highest award ever approved on appeal by a court was $250,000 in California. Now, recently, the Fifth Circuit Court of Appeals in a case arising out of Florida affirmed a $5-million punitive damages award with virtually no explanation of why the manufacturer was guilty. That is five times higher than any criminal penalty of which I am aware that the U.S. Government or any State government ever imposes on any person or corporation for any crime including murder, and yet, as I indicated, the testimony in that case was very sparse as to the nature of culpability, if any there was whatsoever.

Is legislation, however, necessary to cure this problem, or should it be left to the common law system for judges to cure? I had hoped in the mid-1970's that the courts themselves would begin, once the problem became serious, to adopt firm controls over the adjudication of these cases to eliminate the problem, but the experience I just related to you has shown that this is not the case, but the problem continues, is becoming increasingly exacerbated, and it looks like there can be no solution but a legislative one.

Can the State legislatures solve the problem? I would think that theoretically that would be possible, Mr. Chairman but, as a practical matter, the State laws in this area are very diverse, and some States, particularly the western ones, have punitive damages statutes which would have to be amended. Most States do not, and I have little doubt that the State legislatures will do nothing practical to solve this problem—hence, the ineluctable conclusion that the Federal arm of government must take over and try to introduce principle into this system of law.

There are some specific problems that your bill attacks and, I think, attacks successfully, and I would like to highlight those for the record. First and most important, your bill specifies the standards on which punitive damages should be awarded, and with clarity. I endorse those particular standards, and am convinced that they will go a long way to help the proper adjudication of these claims. There are a couple of additional provisions for addition, however, that had been suggested by other panelists today which I would also endorse.

One, and I think an important one, would be to cap the total amount that can be awarded in any single case, and second, to cap the total amount that could be assessed against the manufacturer for any series of cases arising out of a single product problem. A single plaintiff could be limited to an award of, for example, $1 million in any single case. Also, $5 million or 5 percent of net worth could be set as a maximum penalty for the manufacturer in all cases of a similar type.

Finally, one of the major problems in this area is that inflammatory punitive evidence not going at all to defectiveness or causation, the underlying problems in most product cases, sneaks into the record at an early point and contaminates the entire adjudication of the underlying issues, turning the trial from one of a sophisticated engineering decisionmaking process into a political trial of the manufacturer. The total bifurcation of this aspect of the case, removing the question of punitive damages liability as well as damages from the jury, would help solve that problems.

In conclusion, Mr. Chairman, there is a serious punitive damages problem in products liability litigation today. It is a growing problem, and one that needs prompt Federal legislative solution. S. 2631 in its punitive damages section makes significant strides toward solving those problems.

[The statement follows:]

STATEMENT OF DAVID G. OWEN, PROFESSOR OF LAW, UNIVERSITY OF SOUTH CAROLINA

My name is David G. Owen. I am a law professor at the University of South Carolina and a member of the consulting law firm of Keeton, Owen, & Henderson. I was retained some time ago by Colt Industries to help prepare a products liability reform bill, and in that connection I drafted H.R. 5214, which was introduced into the House of Representatives on December 14, 1981 by Congressman Shumway of California. I appear today in my individual capacity as a professor of law and will address the topic of punitive damages.

When the products liability "crisis" first erupted in the mid-1970's, punitive damages were not a major problem for manufacturers. Although there were, at the time, and increasing number of claims for punitive damages, actual verdicts of this type were a rarity, and the highest punitive award that had been upheld on appeal was for $250,000.

The situation has changed quite dramatically since that time. Today, many plantiffs' lawyers routinely make claim for punitive damages, and juries are rendering such verdicts in increasing numbers. Such awards now sometimes reach millions of dollars, and appellate courts are too frequently sustaining enormous assessments of this type without adequate explanation.

Since most courts have failed to provide meaningful standards and guidelines for determining when punitive damages are in order in products liability cases, and for determining the proper amount of such damages, judges and juries are left largely at sea, and awards rain down almost randomly on American industry. When liability for normal, compensatory damages is in issue, one must guard carefully against the risk of random guilt. When at stake instead are millions of dollars in quasi-criminal fines against this nation's leading manufacturers, the random character of the law becomes intolerable—and reform, through legislation, imperative.

I recently completed a study of these problems and published my findings in the Chicago Law Review, in an article entitled "Problems in Assessing Punitive Damages Against Manufacturers of Defective Products," 49 U.Chi.L.Rev. 1 (No. 1, Winter 1982). I there concluded: "Large assessments of punitive damages may not yet be a major threat to the continued viability of most manufacturing concerns, but the increasing number and size of such awards may fairly raise concern for the future stability of American industry." Id. at 7. For the sake of economy, I attach a reprint of the article as an exhibit to this statement and integrate the conclusions of the article in the abbreviated suggestions that follow.

1. Federal legislative reform of the punitive damages remedy in products liability cases is necessary. The courts have themselves caused the problem, and they are probably institutionally incapable of curing the problem. Uniform and adequate legislation by the states on this issue is highly unlikely.

2. Firmer definition of the standard of liability is necessary. The use of (a) the "flagrant indifference" standard, (b) the "extreme departure from accepted practice" standard, and (c) the "clear and convincing" evidence burden of proof, in § 13(a) of S. 2631, and (d) the factors outlined in §§ 13(b) and (c), should all help considerably to reduce the incidence of improper punitive awards.

3. Total bifurcation of the punitive damages issue may be necessary. The Act partially bifurcates the punitive damages issue, leaving the question of liability or not to the jury, yet shifting the determination of amount to the trial judge. Consideration should be given to shifting the entire punitive damages issue to the judge, since otherwise most of the inflammatory evidence and argument will still get before the jury and contaminate the resolution of the complex defectiveness and causation issues in the case.

4. Punitive damages awards should be capped in amount. The criminal law provides that fines shall not exceed certain designated amounts. Similarly, the law of punitive damages should also place maximums on such awards. For example, a $1 million (or double compensatory damages) maximum could be placed on the amount any single plaintiff could recover, and a $5 million maximum (or 5 percent of net worth) could be set for punitive damages in all cases arising from a single product problem. A punitive damages floor could also be set, for example, at the plaintiff's litigation expenses (including reasonable attorneys' fees).

Reforms such as those suggested above are necessasry to infuse the rule of law, and principled adjudication, into the punitive damages issue in products liability cases.

Senator KASTEN. Thank you, Professor Owen.

Our last witness on this panel is Prof. Marianna S. Smith, associate dean of the American University Law School.

Ms. SMITH. Thank you, Mr. Chairman.

I have submitted a written statement which I would like to enter in the record. I will present a summary at this time.

My name is Marianna Smith and I am a professor of law and dean at American University Law School. I am an attorney, and I am also a registered pharmacist. As such, I have been qualified by the courts to testify as an expert witness in products liability cases.

In my capacity as professor, I teach torts and products liability. I am here at the invitation of this committee today and not as a spokesman for any special interest group.

I am opposed to product liability legislation, either at the State or Federal level. My reason is that I think the decisions made in the courts are fundamentally sound. I cannot defend every decision, but most of them are sound. Therefore, I believe that statutory changes are neither necessary nor desirable.

It is the belief of tort lawyers that the law has to remain flexible, capable of some kind of development, and statutory results tend to freeze the law. They tend to tie it down so it doesn't grow.

I also think that the Federal Government has no business getting into products liability actions. Twenty-plus States at this time have passed some kind of products liability legislation, but significantly, none of those are the big commerce States with high populations. It is significant that California and Pennsylvania and Illinois and New York, and other highly commercial States have not passed products liability statutes.

Some claim that a statute is necessary because it would add uniformity to the law. I don't think that is going to result. I don't think so because I have read the bill with care as each draft has come from committee, and it is a simple matter that every State court will have to interpret this bill, and every State court will spend a lot of time defining the words that you have so carefully drafted. I laughed to my assistant yesterday and said it is going to be an attorneys' retirement act if they have to take this bill into every State court and get each one of these words defined.

I want to point out that strict liability as imposed by our courts is not absolute liability. I have heard absolute liability used in these hearings but it is not appropriate. Plaintiffs still have to prove the product was defective; and to prove that the product was defective they have to prove it was unreasonably dangerous—that is not just dangerous, that is unreasonably dangerous. It is a hard burden of proof for plaintiffs to meet.

I have heard in these hearings that the courts have recently imposed strict liability on defendants. Only the form is new. Strict liability has been around as long as we have had warranty law, and warranty law as a form of strict liability has been in this country as long as we have had the common law. It has been the law throughout that time. Many States have only accepted the 402(a) form of strict liability in tort during the late 1970's. In Florida, for example, which accepted 402(a) in 1977, the great bulk of products liability cases are warranty cases, the form of strict liability we have had ever since the development of the common law.

The major point I see, though, that is a real problem about this Federal legislation is that product injuries rarely happen in a vacuum. It is an unusual thing when a product injures a person in the middle of the desert and there is just the product and the victim there to litigate out the issues ultimately. Typically there are many people involved.

For example, if you have an automobile accident, it is not at all unusual to have two or three potentially negligent drivers and the possibility of a defective brake to be among the causes. You may then have a foolish pedestrian that ran out into the crowd and managed to get himself injured—a lot of injuries and a lot of potential defendants. I think it is nonsense to expect a court in the States of this country to impose Federal law on the one defendant who made the defective product and State law on all the other parties. They are not going to be able to do it. They will interpret your statute under the State law they already know, and you will not accomplish your purpose.

I also think one of the problems with this proposal is that we need the fine tuning courts and slow common law development can give to any kind of law. I don't think the kind of legislation that would resolve the problems of a driver of a forklift truck can possibly be fine tuned enough to resolve the problems of a child whose mother took Thalidomide. The two kinds of issues are different. They will not be resolved by this statute.

One other thing I would like to mention is that it troubled me to hear some things which I fear you will think are true and I know they are not. One is that strict liability is absolute liability. It is not absolute liability. Defendants have defenses. Plaintiffs must meet the burden of proof. They don't recover without proving a defect.

One testimony given before you stated that in California a plaintiff did not even need to prove who made the product. That is true in a diethylstilbesterol case. That is a very unique kind of example and it may or may not be good law, but it is not the common law of California in all products cases.

Senator KASTEN. But it is true?

Ms. SMITH. That is right, but just with DES. It troubles me people will think that is the law in California on any kind of a product, because it is not.

I am troubled when I hear that a Government test ought to be evidence that a product is safe and therefore the product cannot be unreasonably dangerous. I grant you that it may often be true, but at this very moment as we sit here, the FDA is negotiating with the manufacturers of bendectin to decide what kind of label to put on it. The new bendectin label may be the best label, but it may be the result of an agreement. And if indeed it should be, then it shouldn't be evidence of safety.

The problem with punitive damages is one I think we all are concerned about. I know I am. But if punitive damages don't punish, they are not punitive, and therefore they have to be for large amounts of money when it is a wealthy defendant. It is a troubling thing for the courts, but I don't think legislation is going to resolve it.

It is my belief that products liability litigation in this country has made for a safer society. That is a desirable result, and that is one of the purposes of tort law. I would conclude that risk is more likely to be prevented if everyone who contributes to that risk is held accountable.

[The statement follows:]

STATEMENT OF MARIANNA SMITH, ASSOCIATE DEAN, PROFESSOR OF LAW, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY

Mr. Chairman and members of the committee, my name is Marianna Smith. I am the Associate Dean and a Professor of Law at the Washington College of Law of American University in Washington, D.C. I am an attorney and a registered pharmacist. As such, I have been qualified by the courts to testify as an expert witness in products liability cases. I have taught torts, products liability, evidence and federal jurisdiction. I am an elected member of the American Law Institute and am admitted to the Indiana and Federal Bar. I am here at the invitation of this Committee, and not on behalf of any special interest group.[1]

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[1] I would like to acknowledge and thank Ms. Karen Shapiro, my research fellow, for her useful ideas and critical review in preparation of this statement.

I am opposed to products liability legislation, at either the state or federal level. This stems from the certainty that the decisions in this area as they have developed at common law are, for the most part, reasonable and sound; therefore, statutory change is neither necessary nor desirable. Consequently, this statement will not address any of the specific sections of this draft legislation, as I have no desire to contribute to the enactment of totally unnecessary legislation. It is important in the area of torts, including products liability, that the law remain flexible and capable of healthy development. Statutory regulation has the undesirable effect of freezing the law, thus preventing growth and development. A statute, no matter how carefully drafted, can never anticipate all of the problems that will arise in so complex an area as this. Such legislation can only be a stumbling block to the orderly development of jurisprudence.

Although product liability laws have been passed in about twenty states, these states are not the major centers of population and commerce. No such law has been passed in New York, Massachusetts, New Jersey, Illinois, Ohio, Texas, California, or Pennsylvania, although, significantly, vigorous attempts have been made to obtain the passage of such legislation in these states. It would ill behoove the federal government to enact such legislation now, when the major states themselves have considered and rejected it.

My home state of Indiana has passed such legislation, and the statute has created many more problems that it has solved. Attorneys from both the plaintiff and defense bars are convinced that it is unconstitutional under state law.

Some claim that a federal products liability statute would bring uniformity to the law, but it is by no means clear that this would be the result. Each state would construe the law according to its own interpretation, with resulting wide variations, and it is exceedingly unlikely that the Supreme Court of the United States would attempt to establish uniformity through the exercise of its certiorari jurisdiction. Tort law, moreover, has historically been an area left to state regulation and control. At a time when the sentiment in this Chamber is to leave traditional state functions to the states—the essence of Federalism—it borders on the hypocritical to propose that Congress should dictate to state courts the rules those courts must apply in product liability cases.

There have been panic-producing statements that sellers are being subjected to absolute liability. That simply is not true. Strict liability is not absolute liability. In every jurisdiction of this country, a plaintiff must prove by a preponderance of the evidence that (1) the product was defective; (2) the defect was an actual cause of the injury; and (3) there are measurable damages.

Advocates of this federal statute have claimed there is a product liability crisis because the courts have imposed a newly created strict liability. This, also, simply is not true. The doctrine of strict liability in the form of warranty has always been a part of the jurisprudence of the common law. During most of this century, warranty was the basis of strict liability recovery throughout the United States. It is based on the sound policy that the seller holds out his product to the public as being fit for use and that it is not unreasonably dangerous. An underlying justification of this form of strict liability is that in many, if not all, cases, negligence in manufacturing or marketing is in fact present, but cannot be proven by the plaintiff because the only evidence of that negligence usually is destroyed by the event causing the injury and any other such evidence is in the hands of the defendant and therefore unavailable to the plaintiff. The acceptance of strict liablility in tort (commonly called 402A) merely reflects the codification of this well-developed warranty law.

In Florida, for example, 402A strict liability was not adopted until 1977. The great bulk of cases in that state predate this event and are all warranty, strict liability claims.

All parties to product litigation will agree the cases are complex. This proposed federal statute will aggravate this situation. Injuries caused by products do not happen in a vacuum. The typical fact pattern includes a multitude of parties and often more than one producing cause. It makes no sense to expect our state courts to apply federal law to the product seller and state law to the other parties involved.

For example, an automobile accident may have been caused by the combined negligence of one or more drivers, the State Highway Department and bystanders, as well as by a defective product. If the drivers were driving at an excessive speed, the state failed to mark the road properly and the bystander foolishly walked into the path of the car but there is also proof of defective brakes on the automobile, it is the task of the court to allocate the responsibility for the victim's injury to the various parties. It is nonsense to expect a court to impose federal law on only one defendant while imposing state law on the remaining parties. The proponents of this act say they are seeking predictability of results. It is my belief it will achieve the exact opposite result. The state judges will interpret this federal law to reflect local policies in their effort to provide justice to all the parties in such an action.

The development of tort law during the last 200 years reflects the fine tuning that can only be achieved by court created case law. There has been a logical development of society's concepts of order and liability on a case-by-case basis, where there has been an able advocate on each side. The courts have slowly, deliberately and carefully developed the law.

It is impossible for one legislative act to anticipate the multiplicity of needs of future litigants. A statute that fits the needs of parties litigating the cause of an injury to the driver of a forklift cannot provide the same solution to the child of a woman who took thalidomide. The needs of the parties are different and only the judiciary can meet these needs properly.

A legislative body responds, as it must, to the temper of the times, if the claims of crisis become sufficiently insistent. Thus the legislature is subject to more influence than the judiciary. Also, it lacks all the factual contacts available which help in the slow but deliberate development of the law. The common law, as created by our courts, is dynamic and able to adapt to changing concepts of justice and social responsibility.

In preparation for this meeting, I read some of the testimony which has previously been given to this Committee. It troubles me that many things you have been told are not true. For example:

(1) Witnesses have said that strict liability is absolute liability. This is not true. Plaintiffs have a burden of proof to meet and defendants have the defenses of assumption of risk and misuse;

(2) One witness told you that in California, a plaintiff didn't even have to prove the defendant was the manufacturer of the product. This is at best only a half-truth. The California Supreme Court has applied a special industry liability to the diethylstilbesterol cases. That fact pattern is unique and different from all other products cases and the decision applied to DES is not indicative of other California products cases;

(3) You have been told that wholesalers and distributors who are mere conduits in the marketing chain have strict liability judgments imposed upon them for the negligence of others. Our legal system has adequate remedies for these parties. The Rules of Civil Procedure clearly allow the adding of the defendants who are ultimately responsible.

(4) You have been told that a government test of a product is evidence the product is safe. While this may sometimes be true, the stories are legion of compromises and outright negotiations between government agencies and manufacturers. One is happening this very day. The F.D.A. has requested the manufacturer of Bendectin to meet with the agency and reach an agreement regarding new labels for the drug. This ultimate label may or may not be an appropriate indicator of the drug's safety since it is the result of negotiation:

(5) You have been told that product liability law as developed by the courts is inconsistent and does not reflect public policy. The decisions of the various states have far more things in common than differences and the common law as developed by the courts is the reflection of public policy.

As it had developed, the law of product liability has made for a much safer society. Historically, many thought of tort law only as a method of compensating the victims of accidental injury and accidental death. That is a commedable and useful social purpose. However, others have recognized that a second and equally important social purpose of tort law is the prevention of accidental injuries and death.

Risk is more likely to be prevented if everyone who contributes to that risk is held accountable.

Senator **Kasten**. Professor Smith, when a crane operator is driving along and he runs into a powerline, how many people are involved in that?

Ms. **Smith**. I don't know the particular case the gentleman mentioned. I would have to read it. One could assume that it is just the driver and the power company, but it could be there are a lot more folks.

Senator **Kasten**. And don't you see some kind of a problem when one State court awards $2.6 million for that accident, and two other States—find something different. It seems to me that a reasonably prudent driver should understand that there is danger involved in running a crane into a powerline.

But there is a basic problem, isn't there, when you go to a neighboring State like Minnesota, or practically a neighboring State, and the exact opposite decision is reached and there are no people running back and forth? This is not involving lots of people, just the crane and the powerline.

Ms. SMITH. One important party we left out is the employer, who may have told that person to do what they did.

Senator KASTEN. He would have told him to drive the crane into the powerline?

Ms. SMITH. We certainly can find you cases, sir, in which employees were put into great risk situations because they were told to do an act by an employer.

Senator KASTEN. Assuming you are correct. Should the employer who gave the inadequate instructions or the manufacturer of the crane be held liable for the $2.6 million?

Ms. SMITH. The legislatures of this country have said that employers have the exclusive remedy of workers compensation, and until the legislatures of this country change that, we are stuck with that result. I don't think any of us have a right to go tell the State legislatures they are wrong.

Senator KASTEN. Excuse me. You believe that when an employer gives instructions to a crane operator to drive into a powerline, and we are dealing with an absurd case, that the crane manufacturer should be liable for $2.6 million?

Ms. SMITH. I didn't say I believe that.

Senator KASTEN. Then, you believe the manufacturer ought not to be because he was not at fault; is that correct?

Ms. SMITH. I don't know if he was at fault. He may have been. I don't know that case, sir. I have not read that case, and without knowing more about it, I am not going to make hypothetical answers as to what the court should have done.

Senator KASTEN. But you do agree that there is a problem when in one case where a crane operator drove into a powerline, the crane manufacturer was held liable and in another State the crane manufacturer was not held liable?

Ms. SMITH. The real problem is the fact, as you have defined it, that one State sees "open and obvious" as a defense, and the other States don't. Isn't that the real problem?

Senator KASTEN. I think the real problem is commonsense and where we are going to——

Ms. SMITH. You are telling the State of Illinois what commonsense is in their definition of the law?

Senator KASTEN. I think we are seeing a lack of commonsense if we don't assume that the crane operator can see the powerline.

One of the other points you made is that we try to identify the responsible people.

Ms. SMITH. Yes.

Sentor Kasten: We had an example. You used one. Maybe you used the forklift truck example because you were here for the hearings we had earlier. In this example a person was picking up window frames with a forklift truck.

Ms. SMITH. Yes.

Senator **Kasten**. And in this case evidently the manufacturer or whoever was making the windows did not give adequate instructions to the driver. What the trial lawyer did was take everybody who had anything to do with that particular vehicle. I'm not sure if they went back to find the people who manufactured the metal that went into the fork of the forklift, but I have seen examples in which the trial lawyers in fact do that. You go through the chain, and you find every single person.

Ms. **Smith**. The entire chain of distribution.

Senator **Kasten**. Now, it is clear that the individual wholesaler who appeared before us, who is now being sued for $8 million—total sales of his company were like $5 million—had nothing to do with that product, or with that injury. He never saw the product to know whether it was defective or not. The wholesaler clearly was not at fault, and yet that wholesaler is having to go to court and is paying legal fees in excess of, he said, $100,000 just in order to get himself out of that chain.

With that particular accident there will be maybe 10, 12, 15, parties—I haven't looked at the whole case—people in that chain, every one of whom are forced to defend themselves in a court of law in order to get out of a chain they never should have been in in the first place. Why can't we address that problem?

Ms. **Smith**. I think that is a problem for the Rules of Civil Procedure to resolve, but as I read your proposed legislation, don't you have a section in which a seller will be held liable if there is a showing the manufacturer cannot come to judgment or cannot pay the judgment or you cannot get jurisdiction over that manufacturer?

Senator **Kasten**. Yes.

Ms. **Smith**. Well, as I read that, it would be very reasonable for a court to say that the seller, the wholesaler in this situation, will be held as a defendant until that is determined. And if so, your wholesaler is going to be in exactly the same predicament. This is a problem for the rules of civil procedure to resolve.

Senator **Kasten**. That is not my interpretation of the bill or of the law, but I want to point out to you the problem that we have here. I assume you are a trial lawyer or maybe you have been one, but a tremendous amount of money is wasted on legal fees to get parties out of the chain. This is the reason why 77 cents is spent for legal fees for 66 cents awarded in damages.

That is the problem that we have, and I wish that you and others would understand it and at least address that particular problem because what we are doing is overlitigating. It is not simply the final determination that is at issue. It is all the costs over all the years that lead up to one final judgment. We are simply wasting time and resources. The cost of this expensive process is being borne by the people that are buying the product, whether it is a lift truck, a crane, or any other kind of product.

Ms. **Smith**. I agree.

Senator **Kasten**. Mr. Eppel, I would like to explore the area of Government standards and contracts. I assume that Mr. Ford favors a Government contract provision because he is a Government contractor in certain kinds of classifications. On the other hand, Mr. Malott made a distinction between specifications set by the Government for a product to be sent to the Government and Government safety standards. That is when a safety standard or whatever is set by the Government or by a Government regulatory body, that that standard be used as a defense.

Could you explore these two areas, please?

Mr. **Eppel**. Certainly. I think there are some differences. As I understand the argument as it relates to Government contracts, it is basically a fairness argument, that the manufacturer, if in truth he did not design the product, should not be held accountable for injuries that flowed from a design that was not his.

In the area of Government standards, that fairness argument is still present but I think it is also accompanied by an efficiency argument: an argument that says that if indeed the FDA does make a bad decision with respect to a warning on a drug, the way to counter the FDA's mistake is certainly not to let, at least it doesn't seem to me to be very efficient to have that matter litigated hundreds and hundreds of times before hundreds and hundreds of juries with hundreds and hundreds of lawyers, judges and court costs in order to decide whether or not the FDA made a mistake, or NHTSA or some other agency.

It seems to me that there ought to be better ways to determine that than repetitive, expensive litigation. If that is not responsive, Senator, please ask me another question.

Senator **Kasten**. No; that is responsive. I just want to take one more step to Professor Smith when she suggests that the standards may be negotiated out with the manufacturers or set by groups of manufacturers, and as such they may not be as safe a standard, or as exact a standard as ought to be set or possibly would be set by a jury.

Mr. **Eppel**. Let me just speak from the experience of our company, and that is that when standards are set by NHTSA, they are not, at least as far as I know, the subject of any undue influence. To the extent that there is give and take, certainly that is part of the process of rulemaking, but the agency still has a statutory mandate to eliminate unreasonable risk when it sets out to set a standard, and again, my response is that if they are not doing their job, there is a better way to check that than repetitive litigation in the civil tort system.

Senator **Kasten**. Ms. Pequet, I want to just push you a little bit on punitive damages. It is not your belief, is it, that punitive damages should be awarded in all cases, even where a manufacturer has not engaged in conduct exhibiting reckless disregard for product safety? Exactly how far are you trying to push this whole punitive damages idea?

Ms. **Pequet**. I think punishment ought to exist where one can prove reckless disregard. I think the standards of the bill for proving that make it impossible to assess punitive damages. I think basically you create two exemptions in the language of the bill that will say manufacturers should never be punished.

Senator **Kasten**. That is not the understanding that we have of the bill, and it is certainly not our intention. You are trying to suggest that punitive damages should not be awarded in all cases, but only in cases where we do have conduct exhibiting reckless disregard. Could you comment on that same point, Professor Owen?

Mr. **Owen**. Mr. Chairman, it seems to me that what the bill does is define quite precisely the type of gross culpability that properly lays a foundation for punitive damages and does exclude, then, many cases that presently are adjudicated on that point today at great cost, in principle and cost in dollars to the system. But those are the cases by definition that ought not to be in the punitive damages arena.

So, I think that your definition is very responsible and burden of proof a very responsible method of solving the problem.

For the record, Mr. Chairman, there were a couple of general assertions made earlier that give me pause. I wonder if I could briefly comment.

Senator **Kasten**. Very quickly, if you would like to make one or two points.

Mr. **Owen**. One was the assertion that there was apparently no single proconsumer measure in the bill. Clearly, this legislation represents in many respects an effort to swing a pendulum, that has been perceived as swung too far, back toward middle ground. So, many of the reforms, probably most in number, do tend toward tightening the system in that direction. But by my quick count, I see three or four major proconsumer improvements in the legislation, and I am sure if we looked carefully at the bill we could find many others.

In the punitive damages area, for example, since this preempts State law, the four States that now prohibit punitive damages awards in any case will now apparently allow punitive damages in these cases. Similarly, in the many States, perhaps majority, where in wrongful death cases—the serious consumer accident cases—punitive damages are now prohibited. Yet, under this legislation, now they apparently will be allowed, another proconsumer measure.

Third, the statute has a 2-year statute of limitations. Many States, including California, I believe, have a 1-year statute of limitations. That provision alone in many States will open up significant avenues of recovery for injured consumers. Finally, assumption of risk is a total bar in some States still today, yet under the statute I believe it is now integrated into the comparative fault scheme and hence only reduces recovery; it does not bar it all together.

These proconsumer mearures in the bill are simply off the top of my head, but I think the record has to be clear that there is, I believe, a genuine effort to provide a balanced system of law in this area. That is all the comment I would like to make.

Senator **Kasten**. I would like to go further, if I may. A number of the people who are representing the various consumer groups are very aware of the difficult and open negotiating process that we have gone through over almost the past 13 months now, as we have struggled through point by point by point.

A number of the changes from draft No. 1 to draft No. 2 to the present bill are the result of those negotiations. And some of us have been surprised at the fact that that has not been recognized in the process of these hearings. I am hopeful that these changes will be recognized, because this is a balanced bill.

Mr. Eppel, are you a member of the American Bar Association?

Mr. **Eppel**. Senator, yes, I am. And as such I must say I was concerned yesterday about the state of the record in terms of what has been going on with the ABA since you last held hearings on this subject.

Senator **Kasten**. Yesterday that was not clear. I assume that there might be a couple of people I could try today.

Are you aware of any actions taken by the ABA which indicate that there are sections of the ABA that now support Federal product liability reform?

Mr. **Eppel**. Senator, yes, I am. And maybe we can do it once, if I can cover the waterfront.

As I understand it, both the section on public contracts and the section on corporation, banking and business law have adopted two resolutions which they have recommended to the ABA house of delegates for consideration at the next annual meeting. Those resolutions, I will not read them, but basically the first one supports in principle a Federal legislative approach to the problem; and the second would withdraw the resolution that you heard so much about during the last set of hearings.

Now, I am personally familiar with the activities of both of those sections. I also understand, although I am not personally familiar with it, that the section on litigation, which is one of the largest sections in the ABA, has considered the matter, decided that it certainly needs further study, and that during the period of any study the ABA should in effect withdraw from the field and simply not take a position one way or the other.

Now, what will happen with these proposed resolutions I do not know, but there certainly has been movement within the association in response to a number of us who certainly did not believe that the position the association took in the last hearing reflected our own personal views.

Senator **Kasten**. Does the house of delegates of the ABA set policy for the association?

Mr. **Eppel**. That is right.

Senator **Kasten**. Will it meet in the middle of August of this year?

Mr. **Eppel**. I do not know the exact date.

Ms. **Smith**. Starts August 6.

Senator **Kasten**. The beginning of August. So we may know what their decision would be by the middle of August, when hopefully we may be in a position to move forward with this bill.

Mr. **Eppel**. Hopefully.

Senator **Kasten**. I thank you, and I would like to thank——

Ms. **Pequet**. Senator, may I respond to just two points, please? I will be brief.

Senator **Kasten**. Yes.

Ms. **Pequet**. On the issue of the consumer aids in this bill, I would like to point out that, as we have all said previously, there are some serious problems at the State level. They have occurred in State legislative actions, not in State case actions. Those legislative actions have occurred in approximately one out of every two States. But those actions nonetheless are very narrow and they have abated. The momentum for those reforms has abated.

The Federal forum then becomes the attention and the focus of people who want to see even more comprehensive change. And I think if you were to tally the number of people in the business community and in some insurance companies who support this Federal bill, we would be pressed to believe that this, in fact, is a comprehensive tort law, not a mere specific issue-by-issue change. It is a comprehensive tort law that alleviates manufacturer and product seller responsibility for tort reparations.

The second point: I am amused a bit by Mr. Eppel's belief that regulatory agencies do not, in fact, set standards at a very minimal level through the process of negotiation with industry. We see the effects of those kinds of standards. We see the low safety thresholds that are established.

And it seems a bit ironic that business should be here arguing that Government, in fact, has set standards that are exactly right and perfect. That is certainly a role that is unique for industry and one that amuses me.

We argue that safety standards are set in agencies, health and safety agencies specifically, through a negotiation process agreeable to industry. Recent action on the regulatory reform bill has moved to restrict the OMB's willingness to meet frequently and secretly with industry. We have advocated a required logging of meetings that go on at OMB, where the final decisions are made, precisely because there is so much interaction at the agency level that keeping tract of those meetings would be impossible.

Senator **Kasten**. I think that Mr. Eppel's point has to be considered as well, and that is if the Government regulatory agency is, in fact, setting standards that are less than safe, then the problem lies with the Government regulatory agency. However, we took this section out of the bill because of a number of points, including some of the ones that you raise.

But I think his point is well taken, that the way to solve the Government regulatory agency standards problem—if they are being set at less than safe levels—is to solve it at the agency level.

I would like to thank all the members of the panel. I would also like to apologize to Professors Birnbaum and Shapo because I skipped panel No. 1 and went to panel No. 2. I did not do that on purpose, so we will go back to panel No. 1 right now with Professor Birnbaum and Professor Shapo. Once again, please accept my apologies for skipping over you. I read the wrong part of the paper at the wrong time.

This panel is made up of Prof. Sheila Birnbaum and Prof. Marshall Shapo. And Professor Birnbaum, if you would go forward with your testimony, please.

STATEMENTS OF PROF. SHEILA BIRNBAUM, AND PROF. MARSHALL S. SHAPO, NORTHWESTERN UNIVERSITY SCHOOL OF LAW

Ms. **Birnbaum**. Thank you, Mr. Chairman.

I do not think Professor Shapo or I are hurt at all. There is more than enough for everyone to say, and I am sure these hearings could go on indefinitely.

I am a professor of law at New York University School of Law and of counsel to the New York firm of Skadden, Arps, Slate, Meagher & Flom, where I represent manufacturers and other defendants in product liability cases. I speak today both as a professor of law and as a practicing attorney. The comments I make do not reflect any of my clients' views but are exclusively my own.

I have been involved in the study and practice of product liability law even before there was a separate area of tort law called product liability law. I have watched its development very carefully throughout the years, both from an academic perspective and from a practicing lawyer's perspective.

Throughout these hearings and last March as well, we heard many speakers express the view that the tort litigation system in the area of product liability law has become exceedingly costly, unpredictable, and increasingly inequitable. I agree with these views. The system no longer serves as well as it might the valuable social goals that it was originally designed to promote, such as enhanced product safety, reduced barriers to compensation for injured consumers, and the efficient redistribution of the costs of product-related accidents.

This morning there are many aspects of the bill that could be addressed, but I would like to focus on a particularly troublesome one: the standard of liability for defectively designed products. Of course many of the things that I will mention are also relevant to the section of the bill dealing with liability for failure to warn.

As the law has developed, 50 different States have various definitions of the obligation of a manufacturer with respect to design. In some States the standard approaches absolute liability, with the manufacturer being asked to serve, essentially, as an insurer of its product. In other States design defect liability is so vaguely defined that juries are permitted to redesign products on a case-by-case basis.

Let me illustrate how this works with a recent product liability case, which I think is very pertinent to some of the problems we have been talking about.

In a case that was affirmed by the third circuit, the plaintiff had claimed that an automobile in which he was injured was defectively designed because the frame of the automobile was insufficiently rigid to protect occupants in the event of a side impact collision. The third circuit, in reviewing the record, noted that the vehicle in question complied with all Federal safety standards and that if the design was changed to incorporate the more rigid frame, which the plaintiff's experts said could have been produced, such a redesigned vehicle would compromise the safety of occupants in front and rearend collisions. Nevertheless, the court, with great uneasiness, affirmed the jury's verdict of over $2 million. The ramifications of this kind of decisionmaking were best described by Judge Adams, a respected jurist, when he observed in his opinion for the third circuit:

> In effect, this permits individual juries, applying varying laws in different jurisdictions, to set nationwide automobile safety standards and to impose on automobile manufacturers conflicting requirements. It would be difficult for members of the industry to alter their design and production behavior in response to jury verdicts in such cases, because their response might well be at variance with what some other

jury decides is a defective design. Under the circumstances, the law imposes on the industry the responsibility of insuring vast numbers of persons involved in automobile accidents.

The inconsistencies that result from permitting juries to redesign products on an ad hoc, case-by-case basis are in large part due to the failure of the system to articulate in a coherent way the standard of liability for defective design.

As a matter of public policy, the strict liability standard does seem to work very well when we are talking about liability for defectively manufactured products. In those instances we are looking at one or several products that come off the assembly line mismanufactured in some way—perhaps because the quality control system did not work as effectively as it should have. In any event, we do have a convenient and readily accessible standard to apply in determining whether the product is defective: Did it meet that manufacturer's own standards or specifications? If it did not, the manufacturer may be held strictly liable for the ensuing damages. Your bill sets out this standard of strict liability for manufacturing defects very clearly.

In these types of cases, we recognize that it would be difficult, if not impossible, for the injured party to go back into the quality control system or the manufacturing process to pinpoint the exact time and place where something went wrong. In fact, there may have been no negligence at all; the mismanufactured product may just have been an inadvertent mistake. Strict liability relieves the injured party of the burden of having to prove negligence. With manufacturing defect cases, the standard of strict liability works. These were the kind of situations that I think Dean Prosser and the California Supreme Court in Greenman against Yuba Power Products had in mind when strict liability was first proposed to address the issue of liability for defective products.

But what we have with the design defect case, on the other hand, is a very different set of problems. A design defect is not a random mistake; it is the result of a manufacturer's deliberate exercise of judgment in which one or more design alternatives are adopted to the exclusion of others.

The challenge by a claimant in a manufacturing defect case is usually limited to a single flawed product. But in a design defect case, the plaintiff is attacking the entire product line—thousands, maybe millions of like products that are out on the market—all of which the plaintiff claims are designed in such a way as to expose users to unreasonable risk of harm. By what standard shall we measure whether the design is defective?

I believe that in fairness the only standard that can be adopted in a design defect case is the one that you are suggesting in your bill. That is, one of fault, of the manufacturer's failure to exercise due care. And that standard in my opinion equitably accommodates the competing interests of both the consumer and the product seller.

Before I go any further, I would like to set the record straight with respect to two or three arguments that were made by the last panel. There was a comment made that strict liability has been around and working well for a very long time as a result of warranty, breach of warranty. That is certainly true. But I do not think that anyone would suggest—not even the most rabid, defense-minded attorney or manufacturer—that we go back to a system of liability based on breach of warranty. Nor would any consumer group suggest this. To be sure, breach of warranty is a strict liability system, but there are many defenses that defeat its utility for the consumer in must jursdictions. Failure to give timely notice, lack of privity, disclaimers all serve to undermine the injured party's claim. However, and this is very important, when we dealt with breach of warranty, we had a standard—merchantability—and at least we knew the definition of that standard. The Uniform Commercial Code told us what that standard was: not fit for the ordinary purpose for which the product was sold.

Well, we no longer have one standard in design defect cases. We have at least five different general standards in use in the courts of this country, plus many, many more substandards for determining what is and is not admissible at trial and what jury instructions should be given. Thus what we know today as strict liability, as it is being applied in courts in design defect cases, is very different from what we had in the past with warranty strict liability.

Also, I would like to address the issue that has been raised that if we have Federal law applying to some defendants and State law applying to others in one lawsuit, that there is something ridiculous or unworkable about that. That is not true, either. Today in almost every product liability case, if you have in the same lawsuit a doctor and a drug manufacturer or a driver and an automobile manufacturer, you have different standards and bodies of substantive law applying. You have a strict liability standard applying in some instances and a negligence standard in others. So whether you call it a Federal law or a different State law, today in our courts we have different laws applying to different defendants, and jurors and judges seem to have little problem following along. In fact, what your bill would do is ease the trier of fact's task by grounding all liability for defective design on a negligence standard.

I have a full written statement of my views with regard to why negligence is the proper standard in design defect cases. There is only one additional point I would like to address briefly before turning the program over to Professor Shapo. The argument is made that plaintiffs will be tremendously disadvantaged by having to prove a manufacturer's negligence in a design defect case and that the burden of proof is almost an impossible one.

If in fact a manufacturer is culpable, negligence is not inordinately difficult to prove. Today discovery is broad in almost every State court, and this is especially true in the Federal courts. The manufacturer's decisions with respect to design are documentable, and there are experts readily available. In fact, if we look at most of the litigated cases, it is clear that plaintiff is always trying to establish negligence in order to influence the jury, even though the charge to the jury may not be couched in terms of negligence. Too often, I think, we have juries trying to apply incomprehensible instructions from the court to a set of circumstances and factual issues that can only be understood as involving questions of the fault and culpability of the manufacturer.

What the negligence standard does is reward those manufacturers that adopt and follow safety standards, while punishing those manufactures that are careless and unconcerned with the safety of consumers and product users. In this way, the bill encourages safety instead of discouraging safety, as some of the critics of this bill are suggesting.

Thank you.

[The statement follows:]

STATEMENT OF SHEILA L. BIRNBAUM, PROFESSOR OF LAW, NEW YORK UNIVERSITY SCHOOL OF LAW

Good morning, Mr. Chairman, Members of the Subcommittee. I am Sheila Birnbaum, Professor of Law at New York University School of Law and Of Counsel to the law firm of Skadden, Arps, Slate, Meagher & Flom. I would like to thank you for your invitation to appear before the Subcommittee to explore the question of product liability reform through federal legislation. I am here today to speak as both a Professor of Law and a practicing attorney—representing both an academic and a practical perspective on the problems involved in product liability law and litigation. The comments I will make today reflect my own views and not those of any clients I may represent.

Throughout the hearing last March and again yesterday, you heard many speakers express the view that the tort litigation system in the area of product liability law has become exceedingly costly, unpredictable, and increasingly inequitable—both for injured consumers and product manufacturers alike. The system no longer serves as well as it might the valuable social goals it was originally designed to promote, such as enhanced product safety, reduced barriers to compensation for injured consumers, and the efficient redistribution of the costs of product-related accidents.

I would like to address my remarks this morning to one specific area of the problem, which I think is particularly troublesome: the standard of liability for defectively designed products. As the law had developed, we have fifty different states variously defining a manufacturer's obligations with respect to how products should be designed. In some states, the standard approaches absolutely liability, with manufacturers being asked to serve, essentially, as insurers of their products. In other states design defect liability is so vaguely defined that juries are permitted to redesign products on a case-by-case basis.

Illustrative of these problems is a recent product liability case in which the plaintiff claimed that an automobile in which he was injured was defectively designed becasue the frame of the vehicle was insufficiently rigid to protect occupants in the event of a side-impact collision. Although the Third Circuit Court of Appeals in *Dawson* v. *Chrysler Corp.*, 630 F.2d 950 (1980), cert. denied, 450 U.S. 959 (1981), recognized that the vehicle in question complied with all federal safety standards and that a more rigid frame might well compromise the safety of occupants in the far more common occurrences of front or rear end collisions, it nevertheless sustained "with uneasiness" the jury finding that the vehicle was defectively designed. The court noted that while this particular jury found the manufacturer liable for not producting a rigid enough vehicular frame, if the plaintiff's suggested alternative design were adopted, another jury in a case involving a different type of accident—e.g., a front end collision—might find the manufacturer liable for producing a frame that was too rigid. As Judge Adams observed.

"In effect, this permits individual juries applying varying laws in different jurisdictions to set nationwide automobile safety standards and to impose on automobile manufacturers conflicting requirements. It would be difficult for members of the industry to alter their design and production behavior in response to jury verdicts in such cases, because their response might well be at variance with what some other jury decides is a defective design. Under these circumstances, the law imposes on the industry the responsibility of insuring vast numbers of persons involved in automobile accidents."

In large part, the inconsistency and lack of uniformity that we see in design defect litigation arises from the failure of the system to acknowledge forthrightly that liability for defective design should properly be grounded on a negligence basis. All too often we see courts struggling to mold notions of strict liability—which is essentially a no-fault principle—to issue that make sense only by looking at and evaluating the conduct or fault of the manufacturer.

As a matter of public policy, strict liability seems to work very well when we are talking about liability for defectively manufactured products. For example, in a typical manufacturing defect case the plaintiff complains that a single mismanufactured product inadvertently rolled off the assembly line, flawed in some way that caused injury. We usually can tell rather easily that the product is defective because we have a convenient and readily available standard against which to judge the product: it fails to meet even the manufacturer's own standards or construction specifications. In this instance it is unnecessarily burdensome to require an injured party to prove that the defect occurred because the manufacturer was negligent in some manner. First, there may have been no negligence at all on the part of the manufacturer. Even the most impeccable quality control system will occasionally permit a flawed product to slip through. Nevertheless, because manufacturing defects are a random but inevitable by-product of mass production, it does not seem unfair to ask manufacturers to assume the losses occasioned by flawed products as a cost of doing business. Second, courts have long recognized as a matter of sound social policy that the manufacturer is usually in a far better position than the injured individual to shoulder the loss of unintentional mishaps in manufacture. The manufacturer is the party who can readily spread the risk most effectively through insurance and price adjustments.

The design defect case, on the other hand, is very different. Unlike a manufacturing flaw, a design defect is neither random, nor inevitable. It is the result of a manufacturer's deliberate exercise of judgment, by which one design option was adopted to the exclusion of others. The challenge in a manufacturing defect case is limited to the single flawed product that caused the plaintiff's injury, but in the design defect case the plaintiff is attacking the entire product line. But how do we determine whether a particular product is defectively designed? We do not have any readily available standard against which to measure the challenged product. In attempting to articulate a standard of defective design, most courts agree that manufacturers should not be held to a standard of absolute liability whereby they are asked to insure the safety of their products. In fairness all that we can ask is that the manufacturer exercise due care in designing products that will not involve unreasonable danger to consumers and users. This, of course, is the traditional negligence standard. And in my view this standard equitability accommodates the competing interests of consumers and product sellers.

The argument that plaintiffs would be tremendously disadvantaged by having to prove a manufacturer's negligence was originally made in connection with early manufacturing defect caes. Indeed, as I have noted, a plaintiff might find it enormously difficult and sometimes even impossible to prove the negligent conduct that led, for example, to the soda bottle with the hairline fracture that ultimately exploded and caused plaintiff's injuries. At some particular moment in time on an otherwise uneventful day, a worker on the assembly line might have been distracted and careless or some slight malfunction in the plant equipment may have damaged a few bottles that somehow managed to slip through the quality-control check points undetected.

But in a design defect case, on the other hand, the alleged defect in the product is neither random, nor unpredictable, nor inevitable. It is the result of deliberate and documentable decisions on the part of the manufacturer. Vastly expanded and liberalized discovery rules, however, enable the plaintiff to prove that the manufacturer's deliberate design decision was an ill-considered one. Plaintiffs have ready access to technical data and expert witnesses, making the assumption that it is unduly difficult or impossible to prove the manufacturer's negligence in design cases fallacious. Furthermore, as almost every vigorously litigated design defect case shows, plaintiffs do in fact come forward with detailed technical evidence tending to prove that the manufacturer was either aware of the nature and gravity of the risk posed by the challenged product or that he could have designed the product more safely. Thus to adopt a negligence standard is only to define in a coherent way the burden plaintiffs typically assume in a design defect case in any event.

Increasingly, many courts and commentators have come to recognize that strict liability—which may be a useful analytic tool in manufacturing defect cases—does not properly describe what we are asking jurors to determine in a design defect context. You simply cannot ignore considerations of the conduct of a manufacturer when attempting to assess the reasonableness of a particular design. The central question we seek to resolve in a design defect case is: in balancing the risks against the utility or benefits of a particular product design, did the manufacturer exercise due care in choosing among various design alternatives that were available to him. Unfortunately, not all courts agree, and even many that do have been unable to present juries with clearly defined guidelines for determining liability for defective design. In all too many instances we have courts sending lay jurors off to deliberate with nearly incomprehensible instructions, leaving them to formulate random and unpredictable judgments. The result has been a confused and inconsistent body of case law.

In some jurisdictions, for example, jurors are permitted to judge whether a product is defective in design by assuming that the manufacturer had knowledge of the risks associated with the product, even where such risks were unknowable or impossible to eliminate at the time of manufacture. In this way, manufacturers have been held liable for not employing technological advances that were not even in existence at the time the product was made. Not only is this unfair, but it hardly serves the goal of providing manufacturers with a true incentive to design safer products.

At least with the negligence standard, where issues of reasonableness and due care are essential to the jury's analysis, conscientious manufacturers can take heart that the efforts and expense devoted to product safety will make a difference in terms of exposure to product liability. The manufacturer can rely on a court of law distinguishing between the safety-conscious and vigilant manufacturer on the one hand, and the lax and careless one on the other.

It seems to me that a primary goal underlying any standard of liability for product-related injuries resulting from defects in design should be the reduction of the incidence of injuries. As a matter of rational social policy, it is of prime importance to build into the rule of law an approach aimed at deterring conduct that exposes consumers and users to unreasonable risks of harm. Only by fusing the rule of law governing design cases to a notion of faulty conduct will the goal of providing manufacturers with a true incentive to design safer products be realized.

I think that probably the most notable and important feature of the federal product liability bill now under consideration is the forthright manner in which it grounds liability for defective design on a negligence standard. Whereas individual states have been unable to arrive at any uniformity in this area, the bill should bring much needed consistency and predictability to this very important area of product liability law.

It would be well to keep in mind Judge Adams' conclusion in the *Dawson* case: "Although it is important that society devise a proper system for compensating those injured in automobile collisions, it is not at all clear that the present arrangement of permitting individual juries, under varying standards of liability, to impose this obligation on manufacturers is fair or efficient."

The public policy questions underlying design defect cases are beyond the competence of any one court or state to resolve on an ad hoc, case-by-case basis; rather, as Judge Adams indicated, it is Congress that must ultimately grapple with these complex issues, which implicate important national economic and social concerns.

Senator **Kasten**. Professor Birnbaum, thank you very much for your testimony.

We will next hear from Prof. Marshall S. Shapo, who is from the Northwestern University School of Law. Professor Shapo.

Mr. **Shapo**. Thank you very much, Senator.

I think I have three qualifications for being here in terms of the discourse that we have heard so far. One is that, like everyone else in the room, I am a consumer. Another is that I am the son of one small businessman and the grandson of another.

And the third, which I take it is the reason I have been invited here, is that I study tort law. I have written or edited half a dozen books that touch the subject of dangerous or risky products, both in the area of product liability and relating to regulation. I think I have read most of the product liability cases decided in the last 15 years, about 4,000 of them, probably a total of 6,000 or 7,000 product liability cases in all, if not more.

Because of previous commitments I have really not had the time that I would like to prepare testimony for this session. But in the few hours that I have had to concentrate on it, I have noted down no fewer than 24 separate points that seem to me to bear on this hearing. I want very quickly to run over half a dozen of them, and then we can have a discussion.

The first is that it is clear that a problem is perceived to exist and that to a certain extent it does exist. It would appear that a significant part of that problem is concentrated in the area of industrial machines, broadly defined.

The second point, once we note the existence of a problem, is that I am not sure that what I have heard thus far this morning sufficiently indicates the strength of the present system for dealing with that problem or the complexity of the reasoning that has characterized the development of State jurisprudence in this area, including the State jurisprudence of strict liability. In particular, I have not heard enough about what seems to me to be the salutary deterrent effects of product liability law as it has developed, including strict liability.

The next point, briefly stated, is that I have been taught since I was a high school debater that the burden of proof is on the proponents of change. It is not clear to me from what I have heard this morning, what I have read in the trade press and what I have seen in prior hearings that the case has been carried statistically or politically. Indeed, from the literature, there seems to be some serious question as to whether there is in fact a crisis.

The fourth point, which is related, is that it appears that manufacturers and insurers are on the whole coping with the problem as it has developed. I have brought some documentation on that point, to which I can refer later on.

I also want to comment on the assertion that product liability insurance cannot be purchased or can be bought only at prohibitive rates. I respectfully suggest that in at least many cases where that is so, it may be that the high level of premiums is a message on social cost; it may well be that in the last 15 years or so we are finally getting the first true assessment and imposition of social costs upon the persons who are creating them.

The next point is what I suppose law professors would call a jurisprudential one, and it is a little complicated, but basically this is the way it goes. The common law rules that we have been talking about, dozens of them really, have been developed over time in a reasoned way by State courts which have been wrestling with this problem. And they have been developed over time in an extremely refined way.

I have a sense that the way this legislative process is likely to wind up is in political horsetrading, one rule for another rule, this rule for that rule. I submit that a very possible outcome of that process will be that you may wind up in the situation I have just described with four rules being traded and getting results that are bad all the way around.

The next point is something of a rehearsal of an argument that has been made before. It is essentially the Federal-State point with a sort of court-legislature point blended into it. I speak to you as one who is passingly familiar, though not intimately familiar, with the homegrown law of the State of Wisconsin on this particular issue, and I suggest to you on the basis of that familiarity that Congress enters at its peril a field in which the Supreme Court of Wisconsin and that State's legislators are in touch with the needs of Wisconsin, in touch with the cases, and in touch with the law.

I must also say that although I have not had the opportunity to study this draft in detail, it seems to me that the general tone of the bill—not in all specifics but its general tone—is not so much one of a bill to provide certainty for manufacturers but simply that of a manufacturers' bill, period.

The bill seems to me to overturn a balance that has been developed carefully over time through the cases and through the law by courts which are in touch with the cases and the law.

As I have suggested, I could say at least a dozen more things, but I will conclude by saying in a very general way that my impression of this bill is that its economics are questionable, that it is possibly bad politics, that it is doubtful as a matter of justice, that all in all it is bad as law.

I would be pleased to answer questions.

[The statement follows:]

STATEMENT OF MARSHALL S. SHAPO, PROFESSOR, NORTHWESTERN UNIVERSITY SCHOOL OF LAW

1. The proponents of the bill have not carried their burden of proof. They have not shown that there is a "crisis," nor that existing institutions are not coping with the problem.
2. In fact, not only are state institutions working out a rationalized solution to the products liability question, insurers and product manufacturers and sellers are themselves dealing with the law in a way that enhances the safety of consumers.
3. The bill does not address the parts of the problem attributable to insurance company practices, which the Interagency Task Force characterized as "past misjudgments and clumsy rate making processes"—problems not really confronted by the Risk Retention Act.
4. The bill seriously undermines principles of federalism, "new" or "old," without fulfilling Secretary Baldridge's standard that proponents of federal legislation should demonstrate "pressing national needs."
5. Each mistake the bill makes will be magnified throughout the country, and, because the bill is federal, will be harder to rectify than inadequacies in state law.
6. The proposal appears to lack recognition that where insurance rates are "too high," they may reflect a proper assessment of the true social cost of the manufacture and sale of risky products.
7. Rather than being a "certainty for manufacturers" bill, the proposal is a manufacturers' bill. Its overflowing tone reflects manufacturers' substantive concerns at the expense of consumers. Moreover, it may well produce as much uncertainty as it resolves.
8. The bill fails to take into consideration the complex relations of this area of the law with other areas of common law and with regulation.
9. The bill deliberately chooses to avoid the process of fashioning a uniform state law. Its proponents have not shown why this option is not legally more sensible than federal legislation. Notably in this connection, after the Commerce Department's study of the issues, its favored solution was a "model uniform act."
10. The bill's origins have largely been hidden from public view. When its contents become more widely known, it will cause controversy, and perhaps a sense of injustice, among consumers.

Senator KASTEN. You suggest that there is some kind of balance that has been carefully developed over time, and that we may be accepting more social responsibility in the last couple of years.

Are you suggesting that the area of tort law ought to pinpoint the cost of the injury on those parties who are most able to pay, most able to spread the risk, or most able to insure against an injury, rather than on those parties who are responsible for the injury?

Mr. SHAPO. I am not. Let me respond on the basis of my study of tort law generally, of which product liability law is only one pocket, although a very important one. My sense is that courts that decide tort cases usually conceive of themselves as being on more than one errand, and that a major part of that errand is fixing fault and responsibility. However, a kind of backup part of that mission may be, if you will, the achievement of a certain amount of risk spreading.

May I say one other thing?

Senator KASTEN. Yes.

Mr. SHAPO. I would like to announce a thesis which I developed at very considerable length in a monograph which was published several years ago [A representational Theory of Consumer Protection, 60 Virginia Law Review 1109]. My basic approach to this subject, developed in that monograph, is one that emphasizes consumer choice, consumer choice in the context of the portrayals and representations of products which have been made by their sellers.

I think that that principle takes you a long way. Yet I also think that there are some cases where it is very difficult to get at the representational basis for product liability, and that in cases of that kind, sometimes a court is appropriately tuned to considerations of straight deterrence or considerations of risk spreading.

Senator KASTEN. I am happy that you admitted at least that there is a trend in the direction of risk spreading. And if you have been reading these cases over the last 10 or 20 years, you have seen an increasing tendency of courts to spread risk rather than pinpoint specific responsibility.

That is clearly happening and those are the kinds of cases that end up going to juries in which large corporations are pitted against poor injured parties. This is part of the gimmick to persuade juries to make large damage awards. One of the purposes of this bill is to pinpoint responsibility of those parties who were at fault for the harm.

You suggested that a problem might exist, but it has not reached crisis proportion. Our figures indicate that the number of Federal product liability cases is increasing dramatically year after year, to the point where we ended up with close to 7,000 claims in Federal courts in 1981. I think the number was close to 3,000 claims only 2 years ago.

At what point would you define this as a crisis? In other words, obviously the number of claims and the number of court suits are not growing fast enough for you to call it a crisis; although other people who have appeared here before, primarily small business men and women, feel that it is. At what point would you define it as a crisis? Would it have to be increasing tenfold each year or twentyfold each year?

At what point would you say the system is out of control?

Mr. SHAPO. I am not sure I can say what those numbers are, Senator. Speaking at an abstract and, I suppose, an academic level, it becomes a crisis when the social costs are being imposed in an unfair or inefficient way, a way that does not reflect the representations that are made for the products and the uses that are made of them.

I would just like to suggest that it seems to me that given the number of product injuries that one sees recorded in the data that come out of the Consumer Product Safety Commission, for example, that I am not sure that 7,000 cases in the Federal courts, and more in the State courts, is an inordinate number.

Senator **Kasten**. Do you feel, Professor, that people are making products less and less safe as time goes by?

Mr. **Shapo**. I am not clear that people are making products less safe or more safe. I do have the sense that with the increasing technological sophistication available to product manufacturers that they are probably on the whole making them more complicated and that it is more difficult for consumers to deal with them in the sense that you and I might deal, let us say, with a shoe that is giving us trouble.

Senator **Kasten**. Was the car frame that Professor Birnbaum referred to more complicated than automobile frames that have been manufacturered over the last 10 or 15 years?

Mr. **Shapo**. I cannot say that.

Senator **Kasten**. Don't you think there has been a change in the attitude of the court system rather than a change in the attitude of the car manufacturer?

Mr. **Shapo**. Well, Senator, that is a question that I would have to do some legal research on. I am not clear, sir, that the law of automobile design has——

Senator **Kasten**. My point is that the automobile frame has not become more complex. The automobile frame has not changed in time. Something else has changed in order to come to that kind of a decision. The frame has not changed in time, nor has the power wire. Something else has changed.

Mr. **Shapo**. May I speak to both of those cases?

Senator **Kasten**. Yesterday, several small manufacturers testified before the subcommittee that over the years they have essentially manufactured the same product line, and in fact can point to safety provisions that they have put into their products. However, the number of claims that they face, for the exact same products, increases each year.

One such individual, a 76-year-old man who manufactured safety masks for football helmets, faced an increasing number of claims against his product. The design of the safety mask had not increased in complexity.

The change has been in the law and a number of us feel that we are reaching crisis proportions in product liability law as it develops. The safety mask is not more complicated. The automobile frame is not more complicated. The change is in the court system.

Mr. **Shapo**. Well, now, I have four things to say. You can cut me off any time you want. The first thing is that I am not clear how much, as a practical matter, there has been change in the law. Professor Birnbaum can speak to that herself. But we were talking before the hearing about the problem of finding out—I do not think anyone really has found out—how much of a distinction juries draw between negligence and strict liability.

Dean Prosser said a long time ago, concerning the prehistory of this development of the law, that probably in 99 percent of the cases, given the existence of the doctrine of res ipsa loquitur, it may not make much difference.

An adjunct to that point is that the leading case on automobile design, which is a 1960's case decided against General Motors, is not a strict liability case, as I recall it. It is a negligence case. Another allied point is that I suspect that a lot of the change is not so much a change in the law as it is a change in litigation consciousness.

But I do want to follow up and suggest that maybe there is a point at which I would accept a limited amount of Federal legislation, and that is if you could isolate a very few points for statutory codification. One that occurs to me—more or less off the top of my head and I have not considered this in great detail—is the repose problem.

I will say, speaking as a consumer, speaking as a citizen, that the idea of holding manufacturers liable when you have a punch press or a chipper or some kind of machine that has been in existence for 40 years for a cause of action, particularly in a successor situation, gives me problems. Maybe you can deal with that problem in a very discrete and isolated way. To take another example, maybe you could deal quite specifically with the damages problem, putting a dollar cap on punitive damages or that kind of thing, although even that has its practical and philosophical difficulties.

Thus, if you could isolate two or three extremely discrete parts of the problem, that might get you a long way to dealing with the problem at its most significant margin.

But it seems to me that trying to house these dozens and dozens of specific rules under the roof of one Federal bill is, among other things, an invitation to further uncertainty and further litigation.

Senator **KASTEN**. Professor, let me just ask you one other question in terms of the crisis. We had a manufacturer here before us who said insurance costs were roughly 3.3 percent of sales a year ago. This year, insurance costs for product liability are going to be 7.7 percent of sales.

At what rate would escalating insurance costs, in your mind, create a crisis?

Mr. **SHAPO**. Well, I cannot say what the number is. I would like to say, in that regard, that it seems to me that those statistics have to be collected in a very broad way and not anecdotally or just from one company.

I would like to add a point, Senator, that I think may have got lost a little bit in some discussions of this issue. I have brought with me a copy of last month's issue of Risk Management magazine, and on page 66 of that magazine there is an article which I present as only typical, illustrative, which is called "Harnessing Computer Power to Reduce Casualty Losses."

I have also brought with me a copy of a weekly newspaper called Business Insurance. In this newspaper there is a double-page ad which is titled "How Many of These 49 Opportunities to Become a Better Risk Manager Can Your Insurance Company Offer You?" The ad refers to pamphlets, films and workshops on risk reduction and loss management techniques concering various kinds of hazards and losses. Not all of these are product-related, but quite a number relate to products.

I am simply suggesting that over time, what we may be getting through the tort liability system as it presently exists is a salutary effect on manufacturer and seller conduct, on insurer conduct. In the same newspaper there is a story which quotes the director of risk management at Coopers' & Lybrand as saying that a risk manager "needs to know about the products his company plans to make, what new markets it plans to enter, what mergers and acquisitions it's considering, and what contracts it's negotiating."

I suggest to you that over time the effects on conduct of the law as it has been developed today will be beneficial, and that you may get a stop in the rise in costs and you may even get a rollback as insurers and manufacturers begin to work together on these issues.

Senator **Kasten**. Well, Professor Shapo, that clearly is not the feeling of most small business people. Because of product liability problems, they have not gone into a new product lines. Because of product liability problems, in fact they have discontinued lines. Because of product liability problems they have laid off employees. That simply is not the case.

Professor Birnbaum, could you comment on the issue that we were trying to address a moment ago? Is the law changing or are we changing our interpretations of the law? Are car frames more complicated this year than they were 3 years ago and are products generally more complicated? Is product complexity the cause of the increase in product liability?

Ms. **Birnbaum**. I think the vast rise in the number of cases we are seeing reflects a change in attitude about the tort system. It is not that cars are being made less safe; in fact, I think everyone would agree that cars are actually being made more safely today than ever before. It is the approach to tort liability that is changing.

I would like to emphasize, Senator, a point raised by Professor Shapo, which I think is a very significant one. Dean Prosser, in his earlier works, when he first suggested that strict liability should be the rule, said that in his opinion about 99 percent of all cases were negligence cases, regardless of strict liability causes of action.

Well, if that is the case and people believe that is the case and Professor Shapo believes that is the case, why is there such concern about putting into effect a negligence standard that everyone agrees is being introduced and argued in the courts in any event? Let us honestly go forward and apply the standard that everyone admits is being alleged and proven rather than sending juries out with incomprehensible instructions, which permit them to apply just a sense of whatever they feel when they are confronted with a seriously injured person.

If that is the case—and Professor Shapo or Dean Prosser is right—that 99 percent of the cases are negligence cases, then what is the concern about applying a negligence standard to negligence cases or what should be negligence cases?

I would like to point out one other thing, if I could, Senator, and that is that we did not have an opportunity to talk very much about the subsequent remedial measures provision of your bill, which in the area of design defect is very important. I think the way in which the bill addresses the problem should go a long way toward assuring enhanced consumer safety. It is true that in those states where subsequent warnings and subsequent changes of design are admissible at trial, we don't have any scientifically documentable evidence to prove whether this leads to more or less safe products.

But if you walk into decisionmaking meetings and listen to corporate decision makers discussing this question, the chilling effects of admitting this evidence is immediately apparent. Corporate executives will in most instances, we hope, change products in any event. But it seems to me that we should be encouraging manufacturers in every way to go out and warn immediately after some danger or risk comes to their attention and to do so in the strongest terms possible, without having to be concerned that whatever they do is going to be used against them in pending and future lawsuits. We should be encouraging manufactures to change their designs with an eye toward promoting safety and efficiency rather than an eye toward assessing the implication of those changes on their exposure to product liability.

Senator **Kasten**. Professor Birnbaum, could you comment on the line of questioning that I was discussing with Professor Smith concerning the method by which the typical trial attorney tries to identify as many people as possible in this chain, even if it means going back to the company that manufactured the alloy that was used to make the fork of a fork lift truck?

Is it a trend, to bring suit against everyone in the chain and then determine which party is best able to spread the risk, whether or not that party is negligent. It also seems to me that all of the parties in the chain must bear tremendous legal costs to get out of the chain. Could you please comment on this point?

Ms. **Birnbaum**. I think that is a good point, Senator. Whether or not it is a trend it is clear that a plaintiff's lawyer usually tries to find as many defendants as he can to bring into the case. This will enable him to get the most for his client by way of settlement or judgment.

Most cases do not go to trial. But, if you have more defendants in the room, you increase the possibility of more defendants participating in settlement discussions and this may well increase the settlement value of the case, regardless whether each and every defendant would or could ultimately be held liable.

And since strict liability provides that everyone in the chain of distribution may be held responsible for a product defect in the same way as the manufacturer, plaintiff's attorneys are quite correct in bringing all of these people into the lawsuit. They cannot be criticized for doing that which the law suggests they do. As a trial tactic and a settlement tactic, the joining of many defendants is quite proper.

Trying to get out of a case with multiple defendants is often, as some of the other witnesses suggested, very costly. Even if you succeed in ultimately getting indemnity from the manufacturer, the enormous costs of litigation—in dollars and time lost in answering interrogatories and providing and preparing witnesses, for example—in a case where you really have no responsibility from a culpability point of view, is exceedingly wasteful.

I think a very important aspect of your bill Senator, is that nonculpable parties in the chain of distribution will no longer be subject to being brought into lawsuits, except where the manufacturer is unavailable. As the law is today, you cannot get out of a lawsuit merely because you happen not to be culpable, because you are still liable under strict liability concepts in most jurisdictions.

The Federal Rules of Civil Procedure, moreover, will not be of any help in this instance. A Co-defendant cannot seek indemnifcation against the culprit manufacturer until there has been a determination that the manufacturer is liable. So you may be in a lawsuit for 5 or 6 years before such a determination is made, all the while bearing the enormous costs of defending the action.

Senator **Kasten**. Well, you are faced with the decision of betting when you know full well that you are not at fault. You can pay part of the claim or pay the lawyers. You are going to lose either way.

Ms. **Birnbaum**. And very often you will settle because it is a much cheaper proposition to settle a case very early on, even though you have no responsibility, than it is to pay the cost of defense, which can be much greater than a minimal, nominal nuisance value settlement. And that happens very often.

Senator **Kasten**. There is a trend, then, that more and more often, people are settling. Even though they are not negligent they settle because the costs and uncertainty associated with defending the case are too great.

Ms. **Birnbaum**. There is no way to quantify that statistically. You hear of all kinds of anecdotal reports of these things going on, and if you practice in the courts you know that very often you settle cases for nuisance value that you believe have no merit whatsoever because the economics of trying to defend those particular cases make such an effort impractical if not prohibitive.

Senator **Kasten**. Thank you. I would like to thank both of you for your help and for your testimony. There may be some additional questions that we will submit to you in writing and we hope that you can get back to us within a reasonable period of time.

Mr. **Shapo**. May I add one brief thing, Senator. One qualification I did not know I had when I came to this meeting was that I possessed, I suppose, the only copy in this room of Professor Birnbaum's distinguished article in the Vanderbilt Law Review—which she has borrowed for the moment on design defects. It is a fine piece of scholarship. I do not agree with all its conclusions, but I want to reiterate the basic point, that it seems to me that the proper forum for the assessment of the persuasive power of Professor Birnbaum's arguments is the courts, especially the State courts.

Senator **Kasten**. I thank both of you for appearing before us.

The next panel includes Mr. Charles Derr and Mr. William Scott. Mr. Charles I. Derr, senior vice president, Machinery and Allied Products Institute. Mr. Derr.

STATEMENTS OF CHARLES I. DERR, SENIOR VICE PRESIDENT, MACHINERY & ALLIED PRODUCTS INSTITUTE, ACCOMPANIED BY FRANCIS W. HOLMAN, JR., SECRETARY; AND WILLIAM W. SCOTT, EXECUTIVE VICE PRESIDENT, V & O PRESS CO., INC., ACCOMPANIED BY JAMES H. MACK, PUBLIC AFFAIRS DIRECTOR, NATIONAL MACHINE TOOL BUILDERS ASSOCIATION, AND MARK J. NUZZACO, ADMINISTRATIVE DIRECTOR AND STAFF COUNSEL

Mr. **Derr**. Mr. Chairman, my name is Charles Derr. I am senior vice president of the Machinery & Allied Products Institute, which is a national organization of capital goods and allied product manufacturers. My associate, Francis W. Holman, Jr., is secretary of the institute.

First of all, I want to commend the Chair and the seven cosponsors of S. 2631. It is an important piece of legislation and we thank you for this opportunity to appear and testify on the bill. The institute generally supports S. 2631 as set out in our principal statement which has been filed for the record.

Now at the suggestion of your staff, in the 5 minutes allotted to me for oral testimony I intend to deal briefly with three topics: First, the tendency of products liability to inhibit or restrict product improvement, research and new product development; second, a subject closely related, subsequent remedial measures; and, finally, a statute of repose.

Although the effect will vary from company to company and indeed from industry to industry, we have no doubt that the threat of products liability tends to inhibit or restrict research in product development and product improvement, including, specifically, improvements in product safety. The institute has twice tested this in surveys of our membership.

In 1976, as part of an institute-wide survey, we asked this question: Have you any evidence that the upsurge in product liability claims has inhibited the development of new products or led to the discontinuance of an existing product or product line within your company? 206 companies answered the question. Of this total, 33 companies, or 16 percent, answered yes.

Among the comments received from those who answered in the affirmative, I cite two examples. "We have discontinued manufacturing two products that we used on aircraft," and the second said, "Made engineering personnel over-conscious to the point of restricting and stagnating product development."

Very recently, in preparation for this testimony, Mr. Chairman, we asked members of the MAPI Products Liability Council, a group of some 71 member company executives with products liability responsibility, this question: Do you believe that the threat of product liability tends to inhibit or restrict research in new product development?

Of the companies which had responded by the time of preparation of this testimony, 71 percent indicated that products liability had inhibited or restricted product development or improvement. And I suggest you note the difference in the percentage from the earlier survey. Numerous examples were cited of products withdrawn, proposed products on which further development had ceased, and existing products on which no further improvements had been made because of the possibility that evidence of such improvements might be used against the company in a products liability suit.

Closely related to the matter just discussed is the question of the introduction of evidence concerning subsequent remedial measures. It is, of course, dealt with in section 14 of the bill. The general rule of law is that evidence of subsequent product repairs or improvements made by the defendant manufacturer is not admissible. There are three reasons of policy for this general rule.

First, the evidence is irrelevant because post-manufacture improvements in safety do not prove that a product seller was at fault at the time the product was manufactured. Second, the public policy of encouraging repairs and improving products would be discouraged if such evidence were admitted. And, third, admitting such evidence unfairly punishes those who take responsible steps to improve product safety.

Notwithstanding the general rule, the effect of *Ault* v. *International Harvester Co.*, the California Supreme Court held that the rule would not apply where the case is based on strict liability; plus the general confusion of the courts in applying the numerous exceptions to this exclusionary rule, appear to have had a chilling effect upon manufacturers.

It is evident from our recent survey that product liability has tended to thwart the making of product improvements, including improvements in product safety, because of the concern that evidence of such improvements might be admitted in product liability cases. Such evidence is, of course, highly prejudicial and very damaging.

As for section 14, it certainly heads in the right direction by applying the exclusionary rule to all products liability cases. The only exception to the general rule permitted by section 14 would apply where such evidence is offered to impeach a witness for the manufacturer or the product seller who has expressly denied the feasibility of such a remedial measure.

In theory, this exception is perfectly acceptable, but we doubt very much if the prejudicial effect of such evidence can be avoided because juries are not likely to distinguish between the purposes for which evidence is submitted.

We believe the safer course would be to exclude such evidence in all cases with the possible exception of permitting the defendant to use it when he is sued for punitive damages.

Finally, the statute of repose. Perhaps no other aspect of S. 2631 is of greater importance to the manufacturers of capital goods and allied products than the question of a time limitation on liability. Capital goods are very long lived. Paradoxically, under current case law, the better the product and the longer it is used, the greater the liability of the maker. It would seem in a rational world that quality and durability should be rewarded, not punished.

But in the case of long-lived equipment, thanks to products liability, just the reverse is true. Moreover, a long-lived piece of equipment may pass through the hands of several owners, be altered or modified, have protective guards or warning labels removed, and be misused in ways that no one could possibly have foreseen.

It appears from the recent MAPI survey that our members generally do not like either of the alternatives appearing under section 12, time limitation on liability. They regard the 25-year period as too long, and the exclusions in coverage too numerous. As for the 10-year rebuttable presumption, several respondents have indicated their concern as to what juries might do with such presumptions.

Based on this reaction, we at MAPI favor an absolute statute of repose. We think it should be no longer than 15 years, and preferably 10 years. It should cover all types of products, and not just capital goods, and it should afford protection against any type of alleged defect of the product involved in litigation.

That concludes my oral testimony, Mr. Chairman. I would be glad to try to answer any questions you may have, sir.

[The statement follows:]

STATEMENT OF CHARLES I. DERR, SENIOR VICE PRESIDENT, MACHINERY & ALLIED PRODUCTS INSTITUTE

Mr. Chairman and Members of the Subcommittee, my name is Charles I. Derr, and I am Senior Vice President of the Machinery and Allied Products Institute.

We greatly appreciate this opportunity to offer testimony on a proposal to establish a uniform federal products liability law. In order that the members of the Subcommittee may better understand our testimony, let me first say a brief word about the constituency we represent and the nature of our interest in the subject.

The Machinery and Allied Products Institute is the national organization of capital goods and allied product manufacturers. The products of such companies—power generation equipment, construction equipment, rolling mills, machine tools, farm equipment and components such as gears and bearings, to mention only a few—are those products directly involved in workplace accidents which result in the most costly products liability claims.[1] Because many of our member companies also manufacture consumer goods, we are equally concerned with products liability as it affects those products. Our interest in the subject dates from 1960 when members of the Institute's Insurance Council first noted a significant increase in suits against machinery manufacturers by employers or their insurers to recover workers' compensation payments made as a result of workplace accidents.

In very short order, suits of this type filed under rights of subrogation became the vehicle by which the injured person sued the machinery manufacturer with recovery of the workers' compensation payment normally a minor part of the total claim. The rest is history. There had always been a smattering of products liability suits, but the developments just described above opened the floodgates. Products liability claims became a growth industry and this growth has been attended by the imposition of enormous and still growing costs on industry and on consumers and, as we shall see presently, upon the whole of our society.

The Institute has been involved at every lamentable step of those developments so briefly described above. Thus we are especially pleased to comment on S. 2631, the Product Liability Act introduced by Senator Kasten and 7 cosponsors. Our statement consists of three parts: a consideration of the need for federal legislation; the overall position of MAPI on federal legislation and S. 2631; and, finally, a section-by-section commentary on the bill.

THE NEED FOR FEDERAL LEGISLATION

The Institute shares the widely held view that federal legislation in general is neither a panacea nor a free lunch. Federal legislation has been overdone, and we commend the present effort to dismantle at least the most burdensome part of the costly and irritating regulatory structure which such legislation has created. Having said that, we nevertheless believe that federal legislation is necessary, indeed indispensable, if we are to solve the national problem of products liability.

The diversity of the law

Most manufacturers sell their products in all or most states of the union. The generally untrammeled character of interstate commerce is largely the result of protection afforded by the Commerce Clause of the Constitution and federal legislation enacted thereunder to prevent the commercial balkanization of the United States. But in products liability today we are very much like the Balkans.

Products liability claims are judged in 51 different jurisdictions by 51 different sets of rules. Obviously, it is more costly to comply with 51 legal standards than with one. As for insurance, a major cost of products liability, the carriers are inclined to apply nationally the rate applicable to that area which has the highest risk factor. In short, the diversity of tort law applying to products liability claims is a national problem which in our opinion requires a national solution.

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[1] As stated in the Executive summary of the Commerce Department's Final Report of the Federal Interagency Task Force on Product Liability," . . . workers injured on the job are involved in 11 percent of product liability accidents resulting in claims payment. However, these incidents account for 42 percent of total bodily injury payments." (p. I-13).

The uncertainty of the law

The diversity of law in 51 different jurisdictions is magnified and aggravated by the uncertainty of the law. Although the common law is constantly changing—to meet the "felt necessities of the time," in Holmes' phrase—it would be difficult to identify any other branch of law whcih has changed as rapidly or as dramatically as the law of products liability. The result has been an unsettling unpredictability as to the outcome of a products liability suit and this uncertainty is in large part attributable to the application of strict liability in tort to products liability cases. (As the members of the Subcommittee know, it is the rule in the overwhelming majority of United States jurisdictions.)

The trilogy of cases[1] which led to strict liability in tort produced even more important fallout in that they led to the adoption of strict liability in tort by the American Law Institute in the Restatement (Second) of Torts (Section 402A). By its terms, the Restatement was not intended to apply to faulty design. However, the courts in large part have applied strict liability across the board including its application to allegations of improper design. Moreover, resourceful counsel and courts seemingly infected by an "entitlement syndrome," have gone well beyond the original misinterpretation of the Restatement (Second) rule to produce some startling and totally unexpected results. As noted above, this prevailing uncertainty has been increased by the existence of 51 different jurisdictions in which one's liability may be determined.

Judge-made law.—In considering a uniform products liability statute, one further fact requires emphasis and reemphasis. Products liability law as it now exists is almost wholly a judge-made product—with, of course, an assist from the legal writers who constitute the American Law Institute. We hae a miscellany of recent state statutes widely varying in both purpose and function and none of which has greatly affected the course of the law. Save for these statutes, products liability law as it now exists owes nothing to legislative activity. We believe that any subject of such enormous economic and social impact as products liability calls for--indeed demands—legislative review and action. We feel matters of such consequence as those comprehended by this subject should be determined by that branch of government which is closest to the people and thus to reality.

The cost of products liability

It seems unnecessary to dwell at length on the cost of products liability—insurance premiums, judgments and settlements paid out of pocket, investigational expenses, legal costs, staff and executive time devoted to avoiding or mitigating products liability claims, etc. The list seems endless and, of course, all find their way into product prices. Inflation has had an assist from products liability.

To test whether or not the costs of products liability are continuing to increase, the Institute recently queried the 71 members of its Products Liability Council on this question. Specifically, they were asked:

"How does the total cost of products liability at your company (i.e., cost of insurance coverage, settlements, judgments, costs of investigation and legal fees, etc.) compare with such costs five years ago?"

To date, 28 companies have responded and 82 percent of those responding companies indicated that products liability costs are higher today than they were 5 years ago. The remaining 18 percent indicated that costs remained at levels experienced 5 years ago. No company reported a decrease in products liability costs over that period of time.

But why is the cost of products liability a reason for federal legislation? There are several reasons and we shall consider each separately.

Direct and indirect costs.—Those costs identified above could be substantially reduced with a uniform federal statute. With the adoption of such a statute for the adjudication or settlement of products liability would come certainty and predictability which do not now exist. The subjective development in insurance premium rating would be reduced and so would premiums. The corporate apparatus for the elimination or mitigation of products liability claims, faced with one known threat rather than 51 uncertain ones, could unquestionably be reduced and made less costly. With increasing certainty as to the outcome of such a suit, the filing of frivolous suits with the unspoken objective of a "nuisance" settlement would be reduced and legal costs further cut down.

The inhibition of research and innovation.—Very possibly the greatest of all the costs of products liability—both to the company and to society—may be one that eludes measurement because it appears on no balance sheet and does not conform to the conventional rules of accounting and reporting. We refer to the very real costs resulting from products liability's inhibiting effect on research and innovation and product development.

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[1] *McPherson* v. *Buick*, 217 N.Y. 382 (1916); *Henningsen* v. *Bloomfield Motors*, 32 N.J. 358 (1960); and *Greenman* v. *Yuba Power Products*, 59 Cal 2d 57 (1963).

It is quite clear from our continuing discussion of this subject with MAPI member companies that the threat of products liability has influenced, and continues to influence, both the fact and the course of industrial research, new product development, and, of equal or greater importance, new business investment. We have spoken of the uncertainty of the law and the unpredictability of the outcome of products liability litigation. Business investment, whether in research and development or new productive equipment, has no greater enemy than uncertainty.

The uncertain shape and character of the threat of products liability has meant that the whole process of innovation in some industries—research product improvement, and new product development—is shadowed by a penumbra of uncertainty and doubt. Useful products have been withdrawn from the market and new products have died stillborn. Moreover, products liability is a serious disincentive to subsequent product repairs or improvements and this disincentive is strengthened by the proposed language of Section 14 of S. 2631. We will return to this matter in our specific comments on the bill.

As part of the brief survey of the MAPI Products Liability Council to which we have already referred, members of the Council were asked: "Do you believe that the threat of products liability tends to inhibit or restrict research and new product development?"

Of the 28 respondent companies, 71 percent indicated that products liability has inhibited or restricted product development or improvement. Numerous examples were cited of products withdrawn, proposed products on which further development had ceased, and existing products on which no further improvements have been made because of the fact that evidence of such improvement might be used against the company.

Thus far, we have discussed the inhibitory effect of products liability on the individual company. We dare not overlook its aggregate effect on our economy and our society. Innovation is the generator of new wealth—in the form both of new investment and new products—and to the extent the process is restricted or inhibited or throttled by the threat of products liability, our whole society suffers. Moreover, innovation is an important equalizing factor in the endless jostle of international competition. We suspect that products liability has played a role in our somewhat less than brilliant international commercial performance in recent years.

International competition.—One thing more needs to be said about products liability and international competition. Beset as we are by aggressive export expansion subsidized by foreign governments, the loss of technological advantage, and a kind of hedgehog defense of nontariff barriers to exclude American products from foreign markets, we hardly need the further burden of extra cost. Yet, thanks to products liability, we have assumed this further handicap. Federal uniform products liability legislation can greatly reduce that handicap and correspondingly improve our international competitive position.

THE MAPI POSITION

As we have already made clear, MAPI strongly favors federal uniform products liability legislation and we want to express our appreciation to Senator Kasten and his cosponsors for the introduction of S. 2631 and for these very imporant hearings. We favor passage of S. 2631 although we believe some parts of that measure can and should be improved. Our suggestions for change and improvement of the bill appear in the following commentary.

INSTITUTE COMMENTS ON S. 2631

Our specific comments on S. 2631 are limited to those which we consider of substantial importance. We repeat our support for the general thrust of the bill. However, we urge that it be changed as suggested below.

Government standards

We note that S. 2631 omits entirely a section appearing in Staff Working Draft No. 2 of Senator Kasten's proposal. Section 6 of the second Staff Working Draft would have created a rebuttable presumption that a product is not unreasonably dangerous if it conforms with federal standards. In addition, where a product is manufactured in accordance with government specifications set out in a government contract, the resulting product would be conclusively presumed to not be unreasonably dangerous. Both of these provisions have been omitted from the bill before us.

We think that these provisions should be restored to the measure and particularly the latter provision having to do with the manufacture of a product in accordance with government specifications. In our judgment, both provisions should be restored but if, for some reason which is unclear to us, it is considered desirable to omit the provision having to do with compliance with federal standards, we believe that the government contract provision should nevertheless be included in the final bill to overcome the injustice represented by the *Stencel* decision.[1]

Time limitation on liability

Perhaps no other aspect of S. 2631 is of greater importance to MAPI member companies than the question of a time limitation on liability. Capital goods are very long-lived and, paradoxically, the better the product and the longer it is used, the greater the liability on the maker. In a rational world, quality and durability should be rewarded, not punished, but in the case of long-lived equipment, thanks to products liability, just the reverse is true. Moreover, longevity is complicated by the fact that a long-lived piece of equipment may pass through the hands of several owners, be altered or modified, have protective guards or warning labels removed, and be misused in ways that no one could have foreseen. Finally, it should be noted that many of these same problems may apply to long-lived consumer products.

We note that S. 2631 includes Section 12 entitled "Time Limitation on Liability" and "an alternative" Section 12. The first, in broad terms, would provide a 25-year statute of repose covering claims of unsafe design or failure to provide adequate warnings or instructions—but not faults in construction—on capital goods only as defined in the proposal. Exceptions would include intentional misrepresentation or fraudulent concealment of information, harm caused by the cumulative effect of prolonged exposure to a defective product, or harm which did not manifest itself until after the statute of repose had run.

Conversely, the alternative provision is not a statute of repose per se but rather would call for creation after 10 years of a rebuttable presumption that the product involved was not unreasonably dangerous because of its design or because of a failure to provide adequate warnings or instructions. (As in the case of the other alternative, faults in construction are omitted from coverage.) It appears that the proviso would apply to all types of products and not just to capital goods. The presumption could be rebutted only by "clear and convincing evidence" as that term is defined. The exceptions are identical to those provided under the first alternative.

In general, MAPI member companies do not like either of the alternatives very much. As for the first, the period of time is too long, the application to capital goods only leaves no protection whatever for long-lived consumer goods, and, finally, there seems no point in omitting the coverage of faults in constuction if the statute of repose period is to be as long as 25 years. Conversely, the 10-year rebuttable presumption, although broader in its application, is simply a rebuttable presumption and the experience of MAPI member companies would suggest that juries in products liability cases have a remarkable tendency to overcome such presumptions.

On the whole, we favor an absolute statute of repose, but we think it should be significantly shorter, certainly no more than 15 years and, preferably 10 years, that it should cover all types of products and not just capital goods, and that it should afford protection against any type of alleged defect in the product involved in the litigation.

The Sindell case

Section 4(a)(2) calls for the claimant to establish by a preponderance of the evidence that the individual product unit which allegedly caused the harm complained of was manufactured by the defendant. However, Section 4(c) constitutes an exception to Section 4(a)(2). Assuming that the court makes three findings stipulated in 4(c)(1), (2), and (3), it may be possible to sustain an action against a group of manufacturers a la the Sindell case where the manufacturer of the product in question cannot be identified.

It must be admitted that the Sindell-type situation presents a most difficult problem for jurisprudence and for society. The underlying rationale of the Sindell decision appears to be that when a claimant is injured, he must be reimbursed even though the person required to make the reimbursement cannot be shown to have caused the injury complained of. It is indeed unfortunate that persons injured by defective products would have no recourse if the manufacturer of the product could not be identified. However, we are inclined to think it worse that a wholly innocent party is, in effect, adjudged guilty and made financially responsible for an accident with which he had no connection whatever.

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[1] *Stencel Aero Engineering Corp.* v. *U.S.*, 431 U.S. 666 (1977).

Subsequent remedial measures

This section, Section 14, would bar admission of "evidence of measures taken after an event, which if taken previously would have made the event less likely to occur . . . to prove liability under this act in connection with the event." An exception to the rule would permit the admission of evidence of subsequent measures in a design defect case ". . . if offered to impeach a witness for the manufacturer or product seller who has expressly denied the feasibility of such a measure."

Our recent survey of members of the MAPI Products Liability Council convinces us that the threat of products liability and, more particularly, the threat of courts admitting evidence of subsequent remedial measures, has thwarted the taking of such measures when in fact it is in the public interest that they be encouraged. When the trier of fact is a jury, its members cannot be expected to distinguish between the purpose for which such evidence is admitted. In our judgment, evidence of this character should not be admitted for any purpose except perhaps regarding the defense of the assessment of punitive damages and, accordingly, we recommend that the last paragraph of Section 14 be stricken.

This concludes our statement on S. 2631. We reiterate our support for the general thrust of the proposal. If the Institute can be or further assistance to the Subcommittee or its staff, we hope that you will not hesitate to call upon us.

Senator **Kasten**. Mr. Derr, thank you very much for your testimony.

Our next witness is Mr. William W. Scott, executive vice president of V. & O. Press Co., from Hudson, N.Y. Mr. Scott.

Mr. **Scott**. Good morning, Senator. My name is Bill Scott. I am executive vice president of the V. & O. Press Co., Hudson, N.Y. We employ approximately 120 employees. Accompanying me today are Jim Mack from the National Machine Tool Builders, public affairs director, and Mark J. Nuzzaco, director and staff counsel at the NMTBA.

We are here this morning to express our support of the Federal product liability statute that provides better certainty than the current hodge-podge of varying State laws. We specifically support your bill, Mr. Chairman, because in addition to certainty, it also provides better fairness. It also addresses what some in yesterday's hearings called the forgotten aspect of the product liability problem—the design, production, and distribution of unsafe products.

It is true that the Commerce Department's task force did cite unsafe products as a reason for the product liability mess. But what these witnesses failed to tell you is that the Uniform Product Liability Act drafted by the Commerce Department, as well as its successors, including your bill, Mr. Chairman, have dealt with this aspect of the problem in a very forceful way by placing the incentive for accident prevention where it will do the most good. It is sometimes with the product seller, sometimes with the claimant, and sometimes with other persons.

We need this bill because it will provide more certainty for all of us—those who manufacture products and those who use them.

I recently, Mr. Chairman, received a wall-type chart prepared earlier this year which shows the differences in conflicts in State law. It is already out of date, because the courts have made new law. Under the current system, I do not know the legal standards against which my product is to be measured in each State. Let me give you an example.

In addition to machine tools, we also make a munitions loading machine. If there is any more obvious danger than that gunpowder can blow up, I do not know what it would be. In my own State of New York and several other jurisdictions, the law places on me the obligation to warn against obvious dangers. In other States, courts have said that if we do put a sign on our machine that says, "Warning, gunpowder can explode," we are liable, because we are watering down the effectiveness of more necessary warnings.

Mr. Chairman, confronted with that design decision, what would you do?

Let me give you another example of uncertainty and confusion. Over the course of time, the design of our products has become more safe. We have made conscious decisions to improve the safety of our product. Until recently, we have been comfortable in the knowledge that those safety improvements decisions could not be used against us to prove that our thousands of older products were defective, but now in three States, including my own, the law is that product safety improvements may be used as evidence that earlier products were defective. This runs counter to public policy, and it runs counter to better safety. Your bill correctly and forcefully addresses this confusion in the law.

Let me give you a third example of how the current law provides confusion and unfairness. Both our company and the company with which I was previously associated have been involved in defending many lawsuits where our products were modified or misused by others. The law dealing with these situations varies all over the lot and provides no clear guidelines to anyone as to what their rights and responsibilities are. Neither does it provide in many States a truly fair allocation of fault as between product sellers and those who modify or misuse their products.

Sections 9, 10, and 11 of your bill provide those guidelines, and, taken as a whole, provide an infinitely higher degree of justice, fairness, and commonsense than the current state of the law in many jurisdictions.

Who pays the price for this uncertainty? Ultimately, Mr. Chairman, we all do. Certainly I can tell you that my company does. We were uninsured for a brief period of time in the late 1970's, when the product liability insurance crisis was at its peak. Today, we are defending five claims which arose out of incidents that occurred during that period. Most of these claims involve equipment that was built more than 25 years ago. The total value of these claims approaches nearly the net worth of our company. If all of them were decided against us we would, for all practical purposes, be wiped out, and I know for a fact that ours is not an isolated example in this industry.

Some of the witnesses in these hearings have suggested that product liability is only an insurance ratemaking problem. Well, Mr. Chairman, as one who has been without insurance during the late seventies, I can tell you first hand that this is simply not the case. Through your leadership, Congress has provided an adequate remedy for the insurance ratemaking aspect of the product liability problem by adopting the Risk Retention Act last year.

That legislation will assure that the benefits of the product liability tort bill now before you will flow where they were intended.

If they do not, or if we encounter insurance ratemaking problems in the future, my company and others like it can form and participate in risk retention groups.

Speaking for myself, my company, my trade association, and the Product Liability Alliance, I can tell you that further Federal legislation respecting product liability insurance is unnecessary; and that we would oppose the inclusion of any Federal insurance regulatory or reporting provisions in your bill.

Clearly, product liability is an issue that must be addressed without delay. I have been in this business for 28 years, and I can tell you, Mr. Chairman, that imbalance, unfairness, uncertainty, and instability in the product liability area are problems that machine tool builders face on a daily basis. We commend you for your leadership. Federal product liability legislation is needed, and it is needed now. We urge the early approval of S. 2631 by this committee and its early adoption by the Congress.

Thank you. We would be very happy to respond to your questions.

[The statement follows:]

STATEMENT OF WILLIAM W. SCOTT, EXECUTIVE VICE PRESIDENT, V & O PRESS CO., INC.

I. INTRODUCTION

Good morning, my name is William W. Scott. I am the Executive Vice President of The V & O Press Company, Inc. The company is located in Hudson, New York and employs approximately 120 persons. We are a member of the National Machine Tool Builders' Association (NMTBA), on whose behalf I am appearing this morning. Accompanying me today are James H. Mack, NMTBA Public Affairs Director and Mark J. Nuzzaco, Administrative Director and Staff Counsel at NMTBA.

NMTBA is a national trade association comprised of more than 400 member companies which account for approximately 90% of United States machine tool production. NMTBA represents those in the business of manufacturing the tools of metalworking productivity, including cutting, grinding and forming machines. Although the total machine tool industry employs approximately 100,000 people with a combined annual output of around five billion dollars, most NMTBA member companies are small businesses like my own, with payrolls of 250 or fewer employees.

While relatively small by some corporate standards, American machine tool builders comprise a very basic and strategic segment of the nation's industrial capacity. This is the industry that builds the machines essential to U.S. industrial strength and military preparedness.

Product liability is of critical and overriding concern to the nation's machine tool builders, and an issue of significant impact relative to the development of critically needed new technology. It is a formidable impediment to interstate commerce.

Product liability also has worked against our ability to compete fairly and effectively in the international marketplace. Let me share with you why this is true.

Foreign machine tool manufacturers often sell the bulk of their goods in countries other than the United States. However, they are now beginning to substantially penetrate the American market. In 1981, 30% of the dollars spent by American industry for machine tools went for imports—one out of seven dollars went to Japan.

Part of a machine tool manufacturer's cost is product liability insurance. As with any other cost, it is factored into the price of their respective products. But, because the United States is only a partial market for foreign machine tool builders, their product liability costs are substantially less than domestic machine tool manufacturers. We still sell the bulk of our products here and must face exposure to product liability with respect to a substantial number of our products.

Perhaps more importantly, our product liability insurance costs are affected by our older products. Under product liability law today in the majority of states, we are potentially responsible literally "forever" for products. We can cite you cases where products that are 30, 40 or even 50 years old have been the subject of product liability lawsuits. While we usually win these suits, they result in high legal and transaction costs. Insurers know this, and factor it in our premiums. Foreign machine tool manufacturers, on the other hand, do not have these older products in this country, because their penetration has been fairly recent. Therefore, their product liability insurance costs often are substantially less than ours. With total instability in our law with regard to older products, we, in effect, have a major stumbling cost block with foreign competition.

Apart from insurance costs, our members, in designing their products, must be highly sensitive to a multiplicity of rules in 51 different jurisdictions. We have to take these factors into account with respect to every machine we make. Foreign manufacturers, who only sell a modest or no amount of machine tools in this country, can ignore this factor. Therefore, when we are competing abroad, the foreign machine tool manufacturer is at a decided advantage because of the helter-skelter nature of our product liability laws.

A uniform Federal product liability law would help us in a number of ways. It would allow us to compete more effectively with foreign manufacturers in this country. Second, it would allow us to compete more effectively with foreign manufacturers abroad. From the point of view of foreign manufacturers themselves, it would also present a fairer situation than they face at present.

We therefore applaud your initiative, Mr. Chairman, in introducing S. 2631, the Product Liability Act ("the Act"). The bill is representative of your ongoing and commendable efforts to bring balance and equity to the product liability litigation system. We sincerely appreciate this opportunity to present our views on this timely and important legislation.

Before proceeding with our comments on those provisions of the Act specifically of concern to us, we would like to discuss briefly the interstate nature of the product liability problem and why it mandates a federal solution.

II. THE NEED FOR A FEDERAL PRODUCT LIABILITY STATUTE

NMTBA appeared before this panel in March to assist in the Subcommittee's assessment of the product liability problem. At that time, we addressed the following: the evolution of product liability tort law, the interstate nature of the product liability problem and its effect on business and consumers, and elements of particular concern to the machine tool industry and how they might be resolved within a federal framework.[1]

While our purpose is not to reconsider at length what we have said previously, we do wish to focus on several points which are particularly relevant to our discusion today.

This legislation has been in the drafting stages since last October, when it was first circulated for public comment. Throughout this comment period we have referred consistently to "the procuct liability problem". Because the area of product liability law is a complex one that does not readily lend itself to laconic analyses, it has at times been difficult to provide a concise explanation of precisely what the "problem" is.

Simply stated, the current state-by-state approach to product liability law has produced a litigation system characterized by uncertainty, imbalance and unpredictability.

Because the rules determining the liability of product sellers for product related injuries have beeen developed almost exclusively by judges on a case by case basis, they vary from state to state, sometimes resulting in direct conflict. Because they are judicially created, these rules may change as the judicial temperament of a court changes. The result: a crazy quilt of law which is constantly in motion and thus is totally unpredictable by consumers, product sellers and insurers. Macroeconomic policy affecting consumer rights, manufacturer responsibiiities, and technological development has, ineffect, been made by judges on an ad hoc basis.

The geographical distribution and interstate flow of products are distinguishing features of the product liability problem. Although a manufacturer may have facilities in only one state, his product may be sold throughout the country via numerous distribution networks. The law applicable in the manufacturer's home state only affects claims that arise there; it does not affect claims arising in the other 49 states.

While 31 state legislatures, including such major manufacturing states as Illinois and Michigan, have passed some limited form of product liability statute, most of these statutes provide only defenses of some type. They do not outline the basic elements of product liability cliams; nor to they define standards for manufacturer responsibility. Most importantly, no two state statutes are exactly alike.

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[1] See generally, U.S. Congress Senate, Committee on Commerce, Science and Transportation, Statement of Emmett McCarthy, vice president, Product Reliability, Dreis & Krump Manufacturing Co., March 12, 1982, before the Consumer Subcommittee, during hearings on product liability reform, 97th Congress, 2d Session, 1982.

This wide variation in state laws contributes significantly to the problem of affordable product liability insurance coverage. In the absence of a uniform standard, insurers are severely hampered in their efforts to accurately predict the potential liability of the manufacturers they insure. While last year's passage of the Risk Retention Act (Public Law 97-45) was a significant step toward effectively addrssing disparate insurance ratemaking practices, theenactment of a balanced uniform product liability law is essential before the insurance affordability/availability problem is completely resolved.

The disparity in state product liability laws also restricts manufacturers from making informed decisions regarding the design of their products for nationwide sale. Some state courts have expanded the strict liability concept (liability without fault) to include product design cases. Where their actions may be judged without regard to whether they were at fault, manufacturers face considerable disincentives to improve the design or safety of their products. Consumers ultimately pay the costs of this uncertainty in higher product prices.

It is within this framework that product liability has emerged as a costly impediment to interstate commerce. Clearly, federal enactment of a balanced product liability law is the most effective and appropriate remedy. A uniform federal law would not add any new basis for bringing actions in the federal courts. It would, however, establish a uniform legislative history providing a common background to which state courts could refer when interpreting the statutory language.

Uncertainties and imbalance in the product liability tort litigation system will undoubtedly continue in the absence of a uniform statute enacted at the federal level. In short, product liability is a national problem requiring a national solution.

III. THE PRODUCT LIABILITY ACT OF 1982

Having briefly identified the need for a federal product liability statute, we will now direct our comments to those product liability issues of significance to the machine tool industry that are addressed by the Product Liability Act (S. 2631).

S. 2631, introduced last month by Senator Kasten, is the culmination of months of exhaustive research and analysis by the Commerce Committee staff. Under Senator Kasten's direction, the staff's first working draft outlining uniform rules of liability was prepared more than eight months ago. Extensive public comment on the draft bill led to a revised version (Staff Draft No. 2), circulated in early March just prior to this Subcommittee's hearing on product liability reform. Two more drafts followed before the bill was introduced on June 16, 1982.

A. Allocation of manufacturer responsibility

Although the tort system was created to fairly allocate liability on the basis of fault, it has evolved into a system which, in some jurisdictions, has eliminated fault as a consideration. In these jurisdictions, all that is required to establish liability is a causal relationship between a product and an injury.

NMTBA views this imbalance as one of the most egregiously unfair aspects of the system; it must be corrected so that design and failure to warn cases are governed by a fault-based standard. S. 2631 adopts this view by providing for an appropriate allocation of fault in design defect and failure to warn cases (Section 5(b) and Section 6 respectively). The use of a fault standard within both contexts clearly indicates that we are working within the confines of a liability, not a compensation system.

Section 4.—First, by including all conceivable product liability causes of action, Section 4(a)(1) assures that all parties—product sellers, consumers, attorneys, and judges—will have a clear understanding of the ground rules for product litigation. It also assures that courts in some jurisdictions will not be able to circumvent Congressional intent by defining casues of action in ways not covered by the Act.

Section (4)(b) requires the claimant to introduce "sufficient evidence" to establish by a reasonable preponderance of the evidence, that the manufacturer was indeed liable. Subsection (b) also clarifies that "expert opinion is not considered evidence to support a proposition of fact unless it is supported or corroborated by sound objective evidence". This clarifying language in subsection (b) is eminently reasonable and should be retained.

Our members report that the use of so-called "expert opinion" is frequently abused in product liability litigation. "Expert" witnesses are paid to expound their own "pet" theories regarding the safety and practical technological feasibility of various product designs.

Further, these "experts" have been known to tailor the content of their testimony concerning the design of a particular product to fit the needs of a given case. For example, an "expert" may, in one product liability action, testify that the design of "Product A" is inherently unsafe and should never have been used; while in a separate action involving different circumstances, he or she may claim that "Product A" would have provided a safer alternative. In the absence of additional "sound objective evidence" to consider, the jury in such cases cannot be expected to make a reasonable determination of what is, in fact, either safe or feasible.

Section 4(d)(1) and (2) overrules the tendency of some courts to permit the offensive use of collateral estoppel by clarifying that proof or acceptance of liability in one product liability action does not set up a domino effect, permitting a judicial assessment of liability in all future unrelated actions involving other claimants.

NMTBA supports the traditional view that the doctrine of collateral estoppel should only be used defensively in product liability actions. It is perhaps justifiable to permit the offensive use of collatral estoppel in a mass accident situation (S. 2631 makes this distinction); but the trend toward its use in unrelated cases not stemming from a single accident should be arrested.

The alternative is to create a situation in which proof of a defective design in one case becomes admissibie to prove defect in every subsequent case in every jurisdiction in the country, regardless of the differing fact situations.

Section 5.—The design liability provisions in Section 5(b) and (c) set forth a clear and sensible outline of the resonsibility of product sellers to safely design their products. These provisions codify the law of most jurisdictions that proof of fault is required to impose design liability.

The definition in Section 5(c) of a product "unreasonably dangerous in design" is appropriately tight. This subsection provides that a product cannot be determined "unreasonably dangerous" without proof that the allegedly dangerous aspect of the problem could not have been eliminated without seriously impairing the product's effectiveness. This proof must be based on "sound support from the scientific, technical or medical community." This provision is particularly useful in preventing the abuses we previously discussed in our comments on Section 4(c).

The requirement in Section 5(d)(2)(A) that at the time of product manufacture any safer alternative design must be "within practical and technological feasibility" assures that courts and juries will not impose "20-20 hindsight" in assessing the liability of product sellers.

The distinction between manufacturing defects and express warranty cases and design defect and "failure to warn" cases is an essential one. The former two are governed in most, if not all, states by a strict liability standard. This is as it should be and Section 5(a) (1) and (2) and Section 7(b) codify strict liability in manufacturing defect and express warranty cases.

Section 6.—Section 6 codifies the overwhelming majority view that liability should not be imposed in a failure to warn case without proof of manufacturer fault.

Section 6(b)(3) and (4) appropriately require that the claimant come forward with a warning or instruction which he or she alleges would have been adequate to avoid his or her injury. Some of our members report situations in which their warnings are pitted in the courtroom against some nebulous but unspecified allegation of inadequacy. This subsection, in effect, forces a trier of fact to compare the specific warning suggested by the claimant with the actual warning provided by the product seller. It also requires the claimant to show that a reasonably prudent person would have observed the warnings, had they been provided.

Section 6(c) establishes balanced guidelines concerning the "unreasonable danger" of a product for lack of post manufacture warnings or instruction. Sections 6(c)(1)(A) and (B) and 6(c)(2) require the manufacturer to make a good faith effort to provide postmanufacture warnings or instructions about dangers of which he was or should have been aware (based on sound support in the relevant community); and that a reasonably prudent manufacturer would have provided in the same or similar circumstances.

Sections 6(d)(1) appropriately defines a product as not unreasonably dangerous if the manufacturer provided warnings or instructions to one of three persons: (A) "a person (including an employer) who could reasonably have been expected to assure that action would be taken to avoid the harm"; (B) "the using or supervising expert" in the case of prescription drugs and similar products; or (C) in certain instances, "the manufacturer's immediate buyer" where there was no practical feasible means of transmitting warnings or instructions directly to the claimant.

Section 6(d)(1) is particularly important to our members, who frequently find themselves facing lawsuits brought by claimants (usually employees) to whom they had no practical means of directly providing the warnings or instructions.

The Committee report should make clear that Section 6(d)(1)(A) covers the situation where a multi-purpose machine is not usable until equipped with cutting tools or dies; and where appropriate guarding of the point of operation can only be accomplished after the cutting tools or dies are installed; and where this installation varies, depending upon the workpiece to be machined: the responsibility for providing instructions regarding the guarding or shielding lies with the employer and not with the product seller.

Section 6(d)(2)(A) specifies that the manufacturer is not liable for failure to warn or instruct about dangers that are obvious, thus overruling New York and other so-called "leading jurisdictions", which have eliminated the open and obvious defense. The majority rule, which this subsection codifies, makes clear that consumers have a responsibility to use products in a safe manner and that manufacturers should not be expected to warn against dangers which a reasonably prudent person should be able to discern and avoid.

By not requiring warnings against dangers that are obvious, S. 2631 increases the likelihood that warnings against hidden or less obvious dangers will be heeded. It also corrects the curious situation faced by product sellers who are liable in some states if they do not warn against obvious dangers, and are liable in other states if they do (because these courts believe that warning about obvious dangers "waters down" the effectiveness of more necessary warnings).

We support the inclusion of Section 6(d)(2)(B) and (C), which make clear that a product seller does not have the responsibility of warning against dangers resulting from either product misuse, or alterations or modifications of the product imposed by the user which the seller could not have reasonably anticipated.

The identification issue

The machine tool industry does not make generic products capable of producing latent harms. Injuries associated with the type of equipment that we manufacture are traumatic in nature; and the particular machine alleged to have caused the harm can usually be readily identified. Therefore, it is difficult to conceive of a situation where our industry would be impacted directly by the recent *Sindell* and *Bichler* decisions.[2]

Sindell and *Bichler* have spawned new areas of product liability litigation centering on the issue of manufacturer indentification. Both these cases involved latent injuries allegedly linked to the cancer-causing drug DES. In *Sindell*, the plaintiff's right to sue was upheld, even though she could not identify the specific company that produced the drug. The *Bichler* decision upheld the plaintiff's right to sue (upon a theory of concert of action), even though the defendant drug company, in a previous action, proved it did not manufacture the DES that caused Bichler's injury.

If the trend set by these decisions is permitted to continue unabated, the manufacturers of some products will be held liable for the fault of other manufacturers of similar products, simply because a claimant was unable to identify the proper manufacturer. This situation is likely to make all manufacturers of affected products virtually uninsurable risks because underwriters will be given the impossible task of guessing about the liability of persons other than their insureds. In the alternative, insurers may reassess upward the product liability premiums of all product sellers, in order to cover the expanded risks of some.

Certainly this Committee faces a difficult task in addressing the issues raised by Sindell and Bichler.[3] These issues must be dealth with in a fair and balanced manner that does not run totally contrary to the fault-based standard established by S. 2631.

Product liability tort law traditionally has required the plaintiff to prove causation. If this bill ultimately modifies basic causation principles, the Committee may wish to balance this modification by limiting a nonidentifying claimant's damages to his or her out-of-pocket expenses.

B. Comparative responsibility

Section 9 of S. 2631 assures that the comparative fault of all persons allegedly involved in causing the claimant's harm—the product seller, third parties (including the claimant's employer) and the claimant himself—is to be assessed by the trier of fact in determining liability and damages. This section codifies the view that comparative responsibility is preferable to the "all or nothing" theory of contributory negligence. The all or nothing character of product liability litigation in some jurisdictions was cited by the Commerce Department study as contributing substantially to the escalation of product liability premiums.

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[2] *Sindell* v. *Abbott Laboratories, et al.*, 26 Cal. 3d 588, 607P. 2d 924, cert. denied, 499 U.S. 912 (1980); *Bichler* v. *Eli Lilly & Co.* No. 244 (N.Y., decided May 11, 1982.)

[3] Section 4(c) outlines the circumstances under which a claimant may bring suit when the manufacturer of the product allegedly causing the harm cannot readily be identified.

In contrast, comparative responsibility principles further the interests of both product sellers and injured plaintiffs. Product sellers are not required to absorb liability to an extent greater than their culpability. At the same time, the provisions in Section 9 help assure that injured claimants are reasonably compensated for all injuries caused by defective products; they are also in a position to recover partial damages if they misused the product and if the product seller is also at fault.

With regard to this subject, we are, however, mindful that some have questioned the appropriateness of allowing the trier of fact to consider the role of non-parties (persons other than the claimant and defendants) when determining the apportionment of liability for the injury. Critics of this provision [Section 9(b)] object to the trial of the so-called "empty chair" as being unfair to both the nonparty and the claimant. We find such objections interesting, but unpersuasive. Allowing the trier of fact to consider what, if any, role a nonparty may have had in contributing to the injury seems to us a vital element in the ultimate determination of whether and to what degree a product manufacturer may be at fault.

This Section works to bring about equity in both the workplace and nonworkplace settings. For example, in the case of an injury resulting from the use of a consumer product in a nonworkplace situation, it certainly seems unfair to exclude from consideration by the trier of fact evidence of the conduct of third persons, who for a variety of reasons may not be parties to the suit, when their conduct may well have been major contributing causes of the injury. Certainly, it is not irrelevant that the toe guard of an injured consumer's lawnmower was removed by his neighbor prior to the consumer injuring his foot while using the product. It is only logical that knowledge of the neighbor's modification of the product would be important necessary information to be considered by the trier of fact in assessing how much responsibility and, therefore, liability the product manufacturer should bear for the injury—whether or not the neighbor is a party to the legal action.

An even stronger argument can be made for such an approach in the workplace setting. Under the current formulation in Section 9(b), an employer who is found to have contributed to a product-related injury will not have any further liability to bear beyond what the claimant has already received in workers' compensation. Nor is the injured worker deprived of any legitimate portion of his remedy, since under the agreement between the worker and his employer embodied in the workers' compensation system, the claimant's workers' compensation payment by definition compensates him (vis-a-vis his employer) for his injury. Therefore, Section 9(b), while disadvantaging neither the injured worker nor his employer, works only as a mechanism to protect the product manufacturer from bearing more than his fair share of the injury-related expense.

Directly related to Section 9's allocation of responsibility among all persons (parties and nonparties) is Section 10's treatment of the particularly troublesome issues of misuse and alteration of products. Section 10(a)(1) of the bill provides that if "a manufacturer or product seller proves by a preponderance of the evidence that misuse of a product by any person other than the manufacturer or product seller has caused the claimant's harm, the claimant's damages shall be reduced or apportioned to the extent that the misuse was a cause of the harm." A similar provision [Section 10(b)(1)] applies to situations in which a product has been altered or modified [as defined in Section 10(b) (2) and (3)] and such alteration or modification was the cause of the harm. In either case, the trier of fact may find that the misuse, modification or alteration was the sole intervening cause of the harm.

We commend the inclusion in S. 2631 of such provisions. By far the most frequent causes of injuries involving machine tools are unsafe work practices and/or improper operating procedures.

In response to the criticism of the trial of the "empty chair," we must point out that in a products liability case the determination of the imprudent conduct of persons other than the product seller (whether or not parties to the action) is, in the majority of jurisdictions, the very essence of a product manufacturer's defense. The majority rule, which Sections 4, 5 and 6 of your bill codify, is that the claimant has the burden of proving that the manufacturer was imprudent in the design of its product or in its failure to provide proper warnings. However, it is often necessary for the defendant to show that the conduct of other persons (often the claimant's employer) actually caused or substantially contributed to the cause of the claimant's harm. Sections 9, 10 and 11 of your bill, taken together, preserve this equitable result.

On the other hand, failure by the trier of fact to consider and assess the imprudent conduct of nonparties leads to unfair results in the monority of jurisdictions. It is essential to equity that S. 2631 codify the majority rule and that the misconceived doctrines of these minority jurisdication, which currently do not permit a manufacturer to make such a defense, be overturned. These jurisdictions argue that the focus in a products liability case should be on the nature of the product itself, rather than the conduct of the persons associated with the design, manufacture and use of the product. The jurisprudential underpinning of your legislation, on the other hand, is to assess and fairly allocate fault among all the relevent persons associated with an injury to whatever degree it may exist; and to apportion liability on the basis of that assessment to the degree it is consistent with already existing compensation mechanisms.

Furthermore, another purpose of this legislation is to assign responsibility for risk prevention to those persons best able to prevent injuries. This goal, we believe, is also accomplished by Sections 9, 10 and 11 taken as a whole.

We further commend S. 2631 for including as part of the definition of "misuse" [Section 10(a)(2)] the failure of a product user to adequately train the claimant, or any other person, where this lack of training was a cause of the claimant's harm.

Recent machine tool industry statistics indicate that 65% of the product liability claims brough against machine tool builders were caused at least in part by the failure of employers to adequately train their employees. Fifty-eight percent of the claimants in these cases had been on the job for six months or less. These data make a compelling case that many workplace injuries involving machine tools could have been prevented had employers adequately trained their employees. As the American Society of Safety Engineers recognized in a recent publication: "injuries [in the industrial workplace] would be rare if equipment were kept in good condition and operated correctly".[4]

It is entirely appropriate that a manufacturer of a defective product which causes injury because of that defect should bear the loss associated with that injury. However, it is unfair that a manufacturer should bear this expense to the degree it was caused by the product user's failure to adequately train or instruct its employee in the proper and safe use of the product. A number of recent cases support this position.[5]

Finally, we commend the inclusion of Section 10(d) which provides that in any reallocation of the uncollectible obligation, a court must take into account the claimant's share of fault—that is, the reallocated obligation would be reduced by the share of fault attributable to the claimant.

C. Effect of workers' compensation benefits

As we indicated in our comments on comparative responsibility, NMTBA data indicates that employer negligence is largely responsible for workplace incidents leading to product liability litigation. The current system in most states permitting a negligent employer to benefit from subrogation is fundamentally unfair and has encouraged lawsuits brought solely for the purpose of recouping workers' compensation benefits.

New York and Illinois have remedied this unfairness by permitting product sellers to recover product liability awards from negligent employers.[6] Opponents of this "remedy" argue that, by breaking the workers' compensation immunity shield for employers, it provides a cure that is worse than the disease. Minnesota, North Carolina, and Pennsylvania have permitted product sellers to recover from negligent employers, up to the limit of the employers' workers' compensation liability. The employer does, however, bear the cost of defending himself, and the product seller bears additional transaction costs of litigation.

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[4] "The Refresher Guide for the Safety Professional," A.S.S.E., 1980, p. VI-57.

[5] See generally, *Santiago* v. *Package Machinery Co.*, 260 N.E. 2d 89 (Ill. App. 1970); *Heldt* v. *Nicholson Mfg. Co.*, 240 N.W. 2d 154 (Wis. 1976), Wisconsin Supreme Court upheld dismissal of complaint following determination that claimant's negligence and that of his employer exceeded that of the defendant. The record was replete with evidence of employer's failure to properly instruct the plaintiff in proper safety procedures; *Levels* v. *Growers Ammonia Supply Co.*, 48 Cal. App. 443 (1975), appellate court upheld judgment that the employer was equally liable on the grounds that it was under nondelegable duty to provide employees with a safe workplace; *Sanchez* v. *Black Brothers Co.*, 423 N.E. 2d 1309 (Ill. App. 1981), appellate court upheld admissibility of evidence that sole proximate cause of plaintiff's injury was employer's failure to properly instruct in the correct procedure for cleaning machine.

[6] *Dole* v. *Dow Chemical Co.*, 30 N.Y. 2d 282 N.E. 2d 288, 331 N.Y.S. 2d 382 (1972). *Skinner* v. *Reed-Prentice Division Packaging Machinery Co.*, 351 N.E. 2d 405 (1976).

Section 11 provides that neither the employer nor his workers' compensation carrier shall have a right of subrogation against the product seller. And, a judgment against a product seller will be reduced by the amount paid as workers' compensation benefits for the same injury, plus the present value of all future workers' compensation benefits payable under the workers' compensation statute. Thus, the transaction costs occasioned by the Minnesota approach are eliminated—but the equitable results are achieved automatically. NMTBA wholeheartedly endorses these provisions.

However, S. 2631 would still preserve the employer's workers' compensation shield and would not permit a product seller to bring a contribution claim against him. Thus, the *Skinner* and *Dole* cases in Illinois and New York would be overruled.

In addition, Section 11(d) overrules the recent tendency of some courts to abrogate employers' immunity in product-related cases by imposing liability on employers who manufactured the injury-producing product (arising out their "dual capacity" as both an employer and a product seller) and by imposing liability upon employers who flagrantly misused workplace products (thus committing an "intentional tort"). We support Section 11(d)'s restatement of the traditional exclusivity theory of workers' compensation.

We recognize that the social policy which initially prompted the establishment of worker's compensation benefits is still valid. The advent of workers' compensation replaced the costly, time-consuming, and uncertain tort litigation process with an efficient administrative system that assures the injured worker of adequate compensation for losses he may have suffered in the course and scope of his employment. In this regard, we appreciate the arguments favoring the full retention of an employer's workers' compensation shield.

However, this original policy fails to reflect the increasing product liability burden placed upon manufacturers of industrial equipment; a burden which is the direct result of the combination of expanding theories of tort liability and the maintenance of employers' workers' compensation tort liability shields.

In any case, we consider Section 11 to be an essential element of S. 2631. We believe that this approach will substantialy reduce current litigation costs without diminishing an employee's right to recover in a products liability claim. And, we understand that the insurance industry has indicated that Section 11 would result in significant premium reductions for sellers of workplace products.

Section 11 is the product of consensus achieved over the past several years among workplace suppliers, employers, labor unions, and insurers. It resolves an issue which has been vigorously argued in Congressional hearings and widely discussed by legal commentators. It fairly and essentially balances the rights of all parties and will substantially reduce transaction costs. We commend Senator Kasten and the Committee staff for their exhaustive efforts to fairly address this complex and controversial issue.

D. Time limitation on liability

My company, V & O Press, was uninsured for a brief period of time in the late 1970's when the product liability insurance crisis was at its peak. Today we are defending five claims which arose out of incidents that occurred during that period. Most of these claims involve equipment that was built more than 25 years ago. The total value of these claims approaches nearly the net worth of our company. If all of them were decided against us, we would, for all practical purposes, be wiped out.

Our problem is one of many that illustrate a major contributing factor in the product liability "mess" from our industry's perspective: the fact that machine tools enjoy such longevity of use in the industrial workplace. It is not unusual for a machine tool builder to be sued in connection with a machine produced more than one-half century ago, and which the manufacturer does not even know is still in existence.

It seems inequitable to continue to hold manufacturers liable for accidents that occur on any machine they have ever produced, regardless of its age, or more importantly, regardless of the state-of-the-art technology at the time the machine was built.

Section 5(d) does much to remedy the latter concern. However, unless some form of repose is established, claims will still be brought, and transaction costs (including legal and investigative expenses) will still be incurred in litigation concerning overage products. Such litigation is inordinately difficult to defend and prosecute because of the absence of records and other evidence necessary to establish liability or lack thereof.

Thus, although the actual amount of dollars transferred to claimants in litigation involving overage products may be relatively small, the transaction costs are substantial. We believe it would be a matter of sound public policy to eliminate these transaction costs (incurred by both parties) by establishing an absolute period of repose. An absolute period of repose is particularly appropriate with respect to capital goods that allegedly cause traumatic injuries. By exempting products that allegedly cause latent harms from an absolute period of repose [Section 12(b)], you have made even more defensible, from the viewpoint of equity and fairness, a public policy which permits product sellers to close out their liability on overage products.

Section 12 proposes two responses to the problem of overage-product litigation; presumably the Committee will decide which (if either) of the two is appropriate. The first is an absolute statute of repose barring design defect and failure to warn claims involving capital goods initially sold more than 25 years prior to the alleged harm. The alternative provides for a rebuttable presumption that the product does not contain a design or failure to warn defect ten years after its first sale, or after the period during which the seller warrants that it can be safely utilized, whichever is longer. The rebuttable presumption could only be overcome by "clear and convincing evidence".

Unquestionably, making the repose conditional by creating a rebuttable presumption of nondefectiveness following expiration of a limited time period would be an improvement over current law. However, needless litigation and transaction costs would arguably still result. Further, we feel it is not appropriate to permit a product seller to fix his own period of repose through a warranty, as provided for in alternative Section 12(a)(1)(B). This provision is not only inconsistent with the goal of uniformity, it is also contrary to public policy: the legislature, not individual product sellers, should determine how long product sellers should be responsible for their products.

NMTBA therefore strongly favors an absolute statute of repose for capital goods. But we believe that the 25 year time period proposed in Section 12 is inequitably lengthy. This provision, as currently written, would permit product liability suits against our members for products they manufactured before the dawnings of the Space Age.

Any period selected will necessarily be subjective. A period which is too short would be "unfair" to some claimants. By the same token, a period which is too long would be "unfair" to product sellers and would result in needless litigation and its attendant disproportionately high transaction costs.

E. Subsequent remedial measures

Section 14 of S. 2631 contains what is referred to as the "Subsequent Repair Rule." We commend Senator Kasten and the cosponsors of S. 2631 for addressing this issue in the legislation.

Specifically, Section 14 states that "evidence of measures taken after an event, which if taken previously would have made the event less likely to occur, is not admissible to prove liability under [the] Act in connection with the event." This language embodies the essence of the common law rule which, simply stated, bars the introduction of evidence of post accident remedial measures taken by the defendant when such evidence is offered to prove that the condition that caused the accident, was the result of the defendant's negligence or culpable conduct.[7]

In the absence of the rule, such subsequent remedial measures can be considered admissions by the defendant that his or her prior conduct was indeed culpable.[8]

Historically, the rule has had its widest application in simple negligence suits such as "trip and fall" cases involving cracked sidewalks, defective stairways, etc. However, the rule has often also been applied in products liability cases. The rule has two sound public policy reasons for its existence.[9] First, such evidence is irrelevant on issues of fault or negligence. Subsequent improvements may be, and generally are, the result of improved technology or knowledge and have no bearing on fault or negligence at a prior point in time.[10] This position reflects the truth in the

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[7] In New York State, the rule has evolved as a matter of common law. See e.g., *Weiner* v. *Serps Auto Wreckers, Inc.,* 24 N.Y. 2d 845, 248 N.E. 2d 601, 300 N.Y.S. 2d 852 (1969); *Getty* v. *Town of Hamilton,* 127 N.Y. 636, 27 N.E. 399 (1980); *Corcoran* v. *Village of Peekskill,* 108 N.Y. 151, 15 N.E. 309. See generally, Richardson on Evidence § 168 (Prince ed., 10th ed.) In some states, the rule has been adopted pursuant to a statutory scheme. See, e.g., Cal Evid. Code § 1151 (West 1968).

[8] Numerous authorities prefer the terminology "subsequent remedial measures" over the language "subsequent repair," because the former is designed to bring within the scope of the rule any post-accident change, repair or precaution.

[9] See C. McCormick, Evidence § 275 (2d ed. 1972).

[10] There exist a number of other situations in which a manufacturer may alter the design of its product without admitting that the previous design was in some way defective. For example,

Continued

witticism of Baron Bramwell, in which he stated that the law rejects the notion that "before the world gets wiser as it gets older, therefore it was foolish before."[11] Therefore, to admit evidence of such corrective measures often would be unduly prejudicial to the defendant.[12]

Second, the use of such evidence would discourage product improvements. A manufacturer may forego product improvements rather than risk increased product liability exposure caused when those improvements are admitted in court. It is against the public interest to impede innovative safety measures.

In achieving the above public policy objectives, Section 14 deals specifically with two aspects of the subsequent repair rule which have created problems in product liability cases. First, although it is almost universally held that evidence of repairs or change of conditions made, or precautions taken, subsequent to an accident, is not admissible as evidence of an admission of negligence before the accident,[13] there is some divergence of judicial opinion over whether the rule should apply to cases labeled "strict products liability."[14]

Section 14 meets this issue by clearly providing that evidence of subsequent remedial measures is excluded in all products liability actions regardless of the legal theory under which the action is brought. This is consistent with section 3(a) of the bill which eliminates the various legal theories and simply denominates any civil action brought against a manufacturer for harm caused by a product as a product liability action. Moreover, this approach comports with the fault-based standard of manufacturer responsibility found in Section 4 of S. 2631, which is the jurisprudential underpinning of this legislation.

Finally, we strongly support Section 14(b), which provides an exception to the general rule of exclusion embodied in Section 14(a). Allowing a court the discretion to admit evidence of subsequent measures in a design defect case, if offered to impeach a witness for the manufacturer or product seller who has expressly denied the feasibility of such a measure, we believe, strikes an appropriate balance between the protection of a defendant's rights, the encouragement of post-accident remedial actions, and the legitimate evidentiary needs of a plaintiff.

F. Economic loss

Product liability tort law traditionally has addressed only personal injuries and property damage, appropriately leaving purely economic losses to commercial law. However, some jurisdictions, including New York, have expanded tort claims to include economic losses by imposing tort liability for acts of commission or ommission actionable under contract law. If these decisions are widely adopted by other jurisdictions and courts persist in treating alleged contract obligations as strict liability tort claims, many sellers of workplace products will become virtually uninsurable risks.

Subsection 3(b) squarely addresses this problem by making clear that actions brought for commercial losses not related to personal injury or property damage claims shall be governed by applicable commercial or contract law.[15]

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marketing considerations may dictate more competitive design and configurations. Even more importantly, technological innovations may necessitate redesign, not only so that the manufacturer's product remains competitive, but also so that the manufacturer can not be accused of failing to employ "state-of-the-art" design in his product. This last reason points out the potential "whip-sawing" of the defendant manufacturer between what, in the absence of the functioning subsequent repair rule, very likely will be characterized by a plaintiff's attorney as a damaging admission of design defect in one case, and the equally dangerous potential of being accused of failing to utilize state-of-the-art design in another.

[11] *Hart* v. *Lancashire & Yorkshire R.R.*, 21 L.T.R.N.S. 261, 263 (1869).

[12] See Richardson on Evidence, supra note 1 at § 168.

[13] 74 ALR 3d 1001, Products Liability—Subsequent Repairs § 3.29 AmJur 2d, Evidence § 275.

[14] In some jurisdictions courts have restricted the application of the long-standing and well-founded subsequent repair rule in strict product liability cases, arguing that somehow there is an economic and conceptual difference between the typical slip-and-fall case sounding in negligence and a products case pleaded on a theory of strict liability. They speak of the former's focus on the defendant's conduct, but the placement of emphasis on the product in the latter. (See *Ault* v. *International Harvester, Inc.*, 13 Cal. 3d 113.) Of course, the real end of such logic is to expand the manufacturer's liability at any cost to the rules of evidence.

In contrast to this minority view, the majority of courts (both state and federal) hold that the subsequent repair rule is just as valid in a strict products liability action as it is in one sounding in negligence, because the interests the rule serves are equally relevant in both contexts. (See *Cann* v. *Ford Motor Company*, — F. 2d — (decided August 19, 1982, Docket No. 80–7603, 2d Cir.)

[15] *Schiavonne Constr. Co.* v. *Elgood Mayo Corp.*, 2 Prod. L. Rptr. p. 8981 (N.Y. App. Div. 1981).

G. Punitive damages

In our view, the central issue concerning punitive damages is the standard under which they are awarded. Section 13(a)(2) provides that conduct meriting punitive action must stem from "reckless disregard"—that is, flagrant indifference to safety and "extreme departure from accepted practice". This subsection appropriately maintains that negligence does not by itself constitute "reckless disregard".

We support the language in Section 13(a)(1) which, in effect, separates the imposition of punitive damages from the principal claim for compensation. Section 13(a)(1) and (2) establishes badly needed safeguards to prevent the plaintiffs' bar from using punitive damages as a "threat" to negotiate higher settlements.

Section 13(c) does much to strike an equitable balance concerning the amount of punitive damages by permitting the jury to determine whether punitive damages should be awarded and directing the judge to decide the actual settlement figure. Section 13(c)(3) will help ensure that the determination of punitive damages by judges will not be arbitrary or capricious. However, we believe this objective would better be accomplished in S. 2631 by simply setting appropriate absolute limits on the amount of punitive damages. The antitrust statutes provide adequate precedent for doing this.

H. Government contract specifications

NMTBA's long involvement with the voluntary standards movement in the United States has provided the Association with an excellent understanding of the importance and significance of industry and government standards in the process of product development. We also appreciate the special circumstances which often pertain to contracts requiring manufacturers to build products to design specifications predetermined by various government contracting authorities. For these reasons, we take this opportunity to suggest that it would be both appropriate and prudent for the Subcommittee to address these topics in the development of this pending legislation.

An earlier working draft of S. 2631 contained provisions exculpating a product manufacturer from liability for a product related injury, if that injury was the result of an aspect of a product which was manufactured in compliance with a Federal Government standard directly pertaining to that aspect of the product, unless the claimant was able to prove by clear and convincing evidence that the product was unreasonably unsafe in design, and that a safer design was not only available and within practical technological feasibility, but would also have complied with all mandatory federal, state, and local government standards.

Unfortunately, government standards, whether they be federal, statewide or local in character, have recently fallen into some disrepute, because of a concern, shared by consumer and business interests alike, that the process by which government rules, regulations and standards are developed has not always fully reflected informed and effective regulations. We believe that the "Regulatory Reform Act" (S. 1080), passed overwhelmingly by the Senate earlier this year, makes major strides in improving the administrative procedures by which Federal Government regulations are promulgated. We fully support this legislation and urge the leadership in the House to bring this important legislation to the floor for swift enactment.

One aspect of S. 1080 which our Association most strongly supported was the provision requiring government agencies to give preference to performance-oriented rather than design-restrictive alternatives when promulgating federal regulations. For numerous reasons, which we have presented in previous Congressional testimony before both Senate and House committees charged with the responsibility for developing regulatory reform legislation, we believe that performance-oriented standards best define and meet the social, economic and environmental ends of regulation, while at the same time restraining technological innovation only to the degree necessary to insure attainment of those goals.

Given the above preferences, we understand the decision to remove references to Federal Government standards from S. 2631.

In contrast to government standards, however, we believe that it is important that this legislation address the issue of the proper significance of government contract specifications in a products liability action. In our view, it is unfair to hold a product seller liable to design choices that are made by a government contracting agency. While some mechanism for compensating harms resulting from unsafe government contract design specifications may be desirable, it is not equitable to place liability on a manufacturer who did not, in fact, participate in the design process. Ascribing such liability to government contractors is inconsistent with the public interest in promoting efficiency and competition by encouraging wide participation in government contract work. Nor is it consistent with the urgent need to improve

America's sagging defense industrial base, and to encourage more small and medium sized companies to participate in defense related work either as prime contractors or as the subcontractor tiers.

It is our understanding that the omission of this issue from S. 2631 resulted from the fact that the topic was originally addressed as a subdivision of the broader subject of government standards discussed above. However, it is also our understanding that there is a consensus which views the topic of government contract specifications as a distinct issue worthy of consideration on its own merits. Therefore, we strongly recommend that the provisions contained in what were Sections 6(b)(1)(3) and 6(c) of Staff Draft No. 2, which provided manufacturers appropriate and balanced treatment when performing under government contracts, be included in S. 2631 as well.

IV. CONCLUSION

These hearings, together with the hearing record established in March, clearly establishes that interstate commerce has been unreasonably impaired by conflicting state court decisions and a hodgepodge of varying state statutes. In short, the current state-by-state approach to product liability tort law is simply not getting the job done.

Mr. Chairman, your bill, S. 2631, restores stability and predictability to product liability law by providing clear and balanced guidelines that can be understood by all parties involved in the litigation process.

Your bill also meets the requirement that a proper resolution of the product liability mess must be fair. Balance and equity between the interests of product sellers and product users must be the foundation of any federal product liability statute.

Finally, S. 2631 truly reflects a bipartisan effort. The broad-based support of your colleagues who are cosponsoring this legislation (Senators Abdnor, Garn, Glenn, Inouye, Lugar, Percy, and Stafford) provides a representative cross section of the United States Senate.

We commend you, Mr. Chairman, for recognizing the severity and extent of the product liability problem and for drafting a bill that fairly addresses the most egregious aspects of that problem. The bill, drafted over a period of months, is a product of precision and care. The swift enactment of an equitable and balanced federal product liability tort law will benefit the entire country, including the individual consumer, through a more innovative and productive national economy.

Clearly, this is an issue that must be addressed without delay. Federal product liability legislation is needed, and it is needed now. We urge its early approval by this Committee and its early adoption by the Congress.

Thank you. We would be happy to respond to your questions.

Senator **Kasten**. Mr. Scott, thank you. It is clear from your comments that unlike at least one of the professors today, you clearly feel there is a crisis. There is a crisis that your company is facing right this very moment, and you are suggesting a crisis in your industry as well. I would like to just make a brief comment, but I also want to have an opportunity to ask you both to respond to some questions.

I think that there is no question that there is a crisis, and I believe that uniform Federal product liability is warranted. I think it is clear that there is no benefit, absolutely no benefit, to be gained in having 51 different product liability laws even if in fact all States enacted a product liability bill.

The reality is clear that American business is done in a nationwide marketplace. A uniform product liability law applicable to all jurisdictions would reflect what is the reality of the modern marketplace. We have heard a number of differences of opinion on what the specific provisions of our bill should be. I think that there are specific guidelines, and one specific guideline that we all should come back to is the issue of fairness, fairness to injured plaintiffs, to manufacturers and sellers, and also fairness to consumers.

I think that the bill should be fair to injured plaintiffs. We want to provide an avenue of recovery with minimal cost so that legitimate damage awards flow to the plaintiff rather than to the litigation system. The bill should be fair to manufacturers and product sellers, providing clear and rational guidelines, to enable them to know their obligations.

The bill should be fair to consumers, providing incentives for the manufacture and sale of safe products, and eliminating the unnecessary costs of product liability which invariably are being paid by the consumers. It is the consumer that is paying the ultimate cost of this wasteful litigation system.

I think it is also clear that we have to deal with the questions that you and a number of other people have brought up. We should not discourage manufacturers from making a product safer or providing better warnings. The system as it is right now is preventing that, and that is of great harm to the consumers.

The comments that we received on the staff drafts as well as the testimony in March have been invaluable. The bill is not cast in stone and we are open to reconsideration of a number of matters.

But I think it is important that we recognize that there clearly is a product liability crisis and a need for reform. It is the consumer that is paying the bill. The system is wasteful, cumbersome, and unnecessarily unpredictable. I believe that we can improve it by working together.

Now, Mr. Scott, did I understand you to say, that your corporation went without insurance for 2 or 3 years and now you have insurance, but are faced with costs from possible settlements that go beyond the net worth of your company?

Mr. **Scott**. In my oral comments, Senator, I was referring to my present company. We were without insurance for a period of approximately 9 months. During that period of time, there were five cases lodged against the company. The damages asked for amount to about $5.5 million. If, in fact, they were all settled against us, we would be out of business.

In my previous association, we were without product liability insurance for about 1 year and 3 months. I would like to make a comment on Professor Shapo's assertion that product liability is just a case of paying the premium. Our product liability insurance was canceled, and we could not get a quotation for a year at any price. That was during the time when many insurers were backing out of the market. We are now defending all of those cases where we in fact did not have insurance coverage.

Senator **Kasten**. Mr. Derr, you pointed out in your testimony that you have surveyed your corporations. I wonder if you could elaborate on the impact of the product liability problem on research and the impact of the product liability problem on new product development?

Mr. **Derr**. Well, there are several aspects to it, Mr. Chairman. First of all, as I said, and this was very evident in the responses to this survey, that people are reluctant to make product improvements, including those that involve product safety, because of the possibility of this being used against them later in products liability suits.

In a larger sense, we think it is affecting—in fact, we are sure it is affecting—research in new product development. A number of companies came back to us. I can't identify the products, because I might identify the companies, but any number of products have had work discontinued on them. That is to say new products, and in a larger sense it seems to me that this affects new investment, and new products, which are the chief generators of business investment. It is a drag on our economy, and right now our economy needs all the help it can get.

We really are in a pretty serious situation, at least as we see it, and this may be the most serious effect of products liability, because it is immeasurable. It is something that is not recorded on a balance sheet or an ordinary accounting report. It is long range, and it affects us internationally. The drag of product liability puts us at a severe disadvantage internationally, both in new products and otherwise.

Senator **Kasten**. I do not know if you have any specific examples that you can provide us with right now, but in either case, we would like to be back in touch with you to possibly review some of the material that you have received from your members. I would like to get specific examples that we could point to, because I think this is an area that, frankly, we need specific examples in order to demonstrate the nature of the problem.

Mr. Mack, yesterday, at least one witness told us that a defendant should be covered by a statute of repose, even where he committed fraud concerning the product. Could you tell us your view on this subject?

Mr. **Mack**. Our testimony, Mr. Chairman, indicates that we believe that a statute of repose is a reasonable public policy to permit persons to, in effect, close the books on matters after a reasonable period of time. We have in the past and in our testimony today indicated that there are clearly some exceptions to this general rule, and that fraud should be one of them. We believe that the public policy arguments can be made even more persuasively in the case of capital goods which allegedly cause traumatic harms rather than latent harms. You have done this in the statute of repose contained in your bill.

In other words, if you can make a case and I think you can—for a statute of repose with a fraud exception: The case can be made even more persuasively for the statute of repose you have in alternative 1 of your bill. We do believe that a 25-year statute of repose would permit lawsuits on products that were made before the dawn of the space age, and, for that reason, we consider it to be unreasonably long.

We also recognize that the proper length of the statute of repose is a subjective matter that policymakers are going to have to resolve.

Senator **Kasten**. Of the two alternative statutes of repose provisions in our bill, which one do you prefer? I understand that you do not prefer either, but given a choice would you choose the 25-year absolute limit or the 10-year rebuttable presumption section?

Mr. **Mack**. Mr. Chairman, if you were to hold a gun to my head and tell me that I had to make one choice or the other, we would choose the first alternative—the absolute 25-year statute of repose for capital goods. We have some reservations about the duration. We also think that, as an overall principle, a statute of repose covering other products is certainly reasonable.

Senator KASTEN. And do I understand you then that your preference would be more along the lines that Mr. Derr spoke to when he talked about a 10- or a 15-year time period rather than a 25?

Mr. MACK. We did not specify a time period. We merely said that 25 years was too long a period.

Senator KASTEN. Mr. Derr, could you comment on the fraud exemption? Witnesses yesterday told us that a defendant should be covered by a statute of repose even where he committed fraud concerning the product. Do you or your association have views on that subject?

Mr. DERR. Certainly there have to be some exceptions. I did not go into that, but I do not think there should be too many, and for everything there should be a time limit on liability. There are all sorts of possibilities, Mr. Chairman. I threw out the possibility of no more than 15 years and preferably 10. We do think 25 years is too long a period of time, at least the companies that responded to our questionnaire, and that is pretty generally the attitude of our companies.

I agree with Jim Mack that if you can make a case for a statute of repose, you can make it even more strongly for capital goods, which we represent. We had a case the other day of a company that is being sued on a machine that was installed in 1917, 65 years ago. That is incredible, but it is a fact. The 25-year statute of repose would help there very much, but if you are talking about fraud or that sort of thing, if you go 25 years, I do not think there should even be an exception for fraud, because how do you prove fraud after 25 years?

It seems to me that the rain must stop falling somewhere. There has to be a limitation in time for all liabilities. Now, I am aware of the problem with pharmaceuticals and chemicals where you have a disease or a defect that does not manifest itself until after the statute has run, and probably you do need an exception there, but I do think that it should be an absolute statute of repose, and not a rebuttable presumption.

Senator KASTEN. Thank you. Mr. Scott, did you have a comment?

Mr. SCOTT. I would like to make one final comment, Senator, why I need this bill. For the first 20 years of my work life, I dealt in specific facts, engineering, sales, manufacturing. In 1974, because I was with a small company, I got into the product liability, and I had to learn a new language. I am not a student of the law. I do not know the words that are used, and just learning the language was a very difficult thing. And then having to learn the rules in 50 States was even more difficult.

I am hopeful that your law will allow me to learn just one set of rules. And then I can go back to doing what I do best, which is manufacturing, sales, and engineering. I have spent 40 percent of my time on product liability cases.

Mr. MACK. Mr. Chairman, I wonder if I could amplify on that. It has been suggested during these hearings that somehow or other a Federal statute is going to create more confusion in the law. It is difficult for me to understand how more confusion than is currently available would be possible. It is true that a Federal law would be subject to interpretation by 50 State courts, but it would clearly be an improvement over the current situation where we face the interpretation of not one but 50 statutes, and 50 sets of common law rules. So, we fail to see how S. 2631 or something like it would not provide infinitely more certainty than the continuation of the unrestrained confusion that we have now.

Senator **KASTEN**. Thank you.

I would like to thank you gentlemen for your testimony, and help.

This concludes the second day of hearings, and it concludes this set of hearings. I would like to remind all the witnesses that there may be questions from other Senators. We hope that you can get back to us with responses to those questions. Thank you all very much. The hearing is adjourned.

[Whereupon, at 11:55 a.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF THE MACHINERY AND ALLIED PRODUCTS INSTITUTE

The Machinery and Allied Products Institute (MAPI) is pleased to submit this statement to the Subcommittee as part of its consideration of possible remedies for the nation's products liability problem. We are pleased that the Subcommittee has undertaken hearings and are hopeful that they will led to the enactment of a meaningful legislative remedy for a problem which has assumed alarming proportions for America's manufacturers of capital goods and allied products. As the Congress endeavors to assess the best legislative remedy, industry continues to pursue the only means of self-help available—vigorous programs to improve product safety, to reduce the possibility of product failure and consequent personal injury and/or damage to property, and to secure financial protection against the seemingly uncontrollable monetary consequences of adverse judgments through commercial insurance, where available and affordable, or through various types of self-insurance.

MAPI is the national representative of the capital goods and allied products industries. Reflecting the concerns of its membership, the Institute has been directly involved in the products liability issue since 1960. That involvement has included, among other things, membership surveys on the problem; biannual meetings of its Products Liability Council, composed of representatives of approximately 70 of the Institute's major member companies; numerous publications on the subject reflecting original research and commentary; and appearances before most of those committees and subcommittees in both the Senate and the House which have considered the subject during recent years.

It is our understanding that the Subcommittee, having already developed in draft form legislative language which, if adopted, would have the effect of substantially modifying state tort law insofar as products liability cases are concerned, now seeks in the current hearings to broaden its understanding of the nature and scope of the products liability problem. This statement is intended to provide the views of the Machinery and Allied Products Institute in support of that goal. Additionally, having earlier submitted comments on the first draft of the tort reform legislation developed by the Subcommittee staff,[1] we are pleased to offer some brief comments and observations regarding the second draft of the proposed legislation, and are hopeful that such comments may prove useful to the Subcommittee in its continuing effort to develop legislation which will be appropriately responsive to the needs of America's manufacturing industries, and at the same time protect the public interest.

We applaud the initiative of the Chairman of the Subcommittee, Senator Kasten, and that of its staff in undertaking this reform effort. More particularly, we are generally pleased with the changes in the first draft of the contemplated legislation which are embodied in the second draft. Our comments on the second draft are preceded by a few observations with regard to the need for products liability legislation and certain conceptual points which should govern any legislative process in this area.

At this juncture we should recognize the initiative of Congressman Norman D. Shumway who has introduced H.R. 5214 providing for federally preemptive products liability tort law. Congressman Shumway appeared before the Subcommittee on March 9.

THE NEED FOR AND DESIGN OF PRODUCTS LIABILITY LEGISLATION

Although the Institute has long opposed the expansion of federal activity in areas of public policy better governed at the state level, we have come to the reluctant conclusion that federal legislation in the area of products liability tort reform is necessary. To be sure, several states have in the recent past enacted legislation attempting to ameliorate the undesirable and in some cases disastrous consequences of "judicial legislation." Nevertheless, the cumulative effect of varying state legislative initiatives on *interstate* manufacturers and their efforts to comply with these laws and to secure vital products liability insurance have produced an unacceptable result—a complex maze of products liability laws the most liberal of which necessarily strongly influence premiums, and industry's efforts to set aside reserves for uninsured liabilities. Consequently, as noted above, the Institute has concluded that to achieve the uniformity of products liability tort law necessary to the predictable determination of corporate liability federal legislation is necessary in the form of a uniform code preempting state law in certain substantive and procedural areas.

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[1] Our comments on Draft 1 were transmitted to the Subcommittee staff by an Institute letter dated December 22, 1981 to Chairman Robert W. Kasten.

The second staff draft of proposed products liability legislation currently being reviewed by the Subcommittee staff addresses, in our opinion, the critical areas of both procedural and substantive tort law. While we generally agree with the thrust of the second draft and with the continuing efforts of the staff to achieve the legislative solution which will provide the greatest equity, we do have some comments with regard to specific provisions of the draft. However, prior to setting forth our comments, permit us to suggest certain general propositions which are frequently overlooked in any consideration of products liability and its impact.

1. Although legislation designed to reduce both the volume and cost of products liability litigation is necessary for appropriate protection of manufacturers and other product sellers, it would be of equal or greater value to consumers who, if the enterprises who serve them are to survive, must ultimately pay all the costs of products liability in the form of higher product prices.

2. The swift growth of products liability has greatly inhibited research and development in certain fields. This has tended to choke-off some lines of technical and scientific inquiry and to cause certain new products to die stillborn. Although difficult to measure, our experience at MAPI convinces us that the cumulative effect of these inhibitions is a substantial negative impact on the international competitive position of American industry and on the national economy.

3. According to the report of the Interagency Task Force on Products Liability, products liability case arising out of workplace accidents are less numerous but individually more costly than cases of this type involving consumer products and, thus, deserve special consideration.

4. The present state of products liability law is almost wholly judge-made and devoid of any consistency of coherence from the standpoint of public policy, which must reflect not only the needs of the individual but also the broad-scale interests of society.

In the light of these considerations, the interests of qualified manufacturers and sellers and those of users and consumers are not adversary in an overall sense. Contrary to this position, testimony by consumer spokesmen adduced thus far seems to reflect an almost automatic assumption that the interests and rights of users, consumers, and employees in the workplace are in conflict with producers and sellers. In MAPI's view, this is not the case and the public interest calls for full recognition of the propositions which we have just stated. Otherwise, in our view, in a large sense there will continue to be in the products liability area a serious and unfavorable effect on the technological base and economic growth of this country. More narrowly speaking, inequities, punishing costs of litigation, insurance, and inefficient diversion of management time and energy plague industry, particularly smaller companies. Emotion must be wrung out of the process of dealing with this issue and replaced by a realistic appraisal of the problem and its solutions, including federal tort law reform.

It is appropriate to recognize that the general propositions summarized above are entirely consistent with the thrust of the testimony of Victor E. Schwartz on March 9, 1982. Mr. Schwartz' expertise in the field of products liability is widely recognized, and he has had the unique opportunity to observe the products liability problem from many viewpoints.

SPECIFIC COMMENTS

Our specific comments on Draft 2 of the proposed legislation are provided below, identified by section and subject.

Section 2—Definitions

The definition of "clear and convincing evidence" has been expanded to provide, in part, the following guidance to both judiciary and jurors: "the level of proof required to satisfy this standard [clear and convincing evidence] is more than that required under preponderance of the evidence, but less than that required for proof beyond a reasonable doubt." This addition is helpful to the extent that it further clarifies this critical term, a term upon which the extent of financial liability of a defendant corporation may well depend in future litigation.

Similarly, new language within the definition of "harm" appears generally helpful in clarifying the types of losses for which financial compensation may be sought through a products liability suit. We consider as especially important the limitation on harm which precludes "commercial loss." This area of liability is more correctly governed by applicable provisions of the Uniform Commercial Code, as adopted by the states.

We note the substantial changes in the definition of "manufacturer" which in some respects may not be an improvement. Specifically, the definition no longer includes "any person who is engaged in a business to *design* . . . or *remanufacture* any product (or component part of a product). . . ." [Emphasis added.] The purpose for eliminating the two terms underscored is not clear and may fail to reflect two production functions—i.e., the design of the product as a separate and independent aspect of product manufacture and the remanufacturing of products which in some sectors of the capital goods industries is an important aspect of business.

We applaud the inclusion in the second draft of a definition for "reasonably anticipated conduct" which has the general effect of reestablishing the time-honored concept of the prudent man standard—a standard upon which the design and production of virtually any product must rely in order to avoid the unacceptable consequences to American industry which have resulted in recent years from the application of unreasonable standards. These standards—described and applied by the courts in varying ways—have had the effect, in some cases, of making the manufacturer an absolute insurer of its product's performance, regardless of use or abuse.

Section 3—Preemption of other laws

In identifying those products liability suits which would be governed by the provisions of the proposed act, Section 3(a) now specifically includes "absolute" liability in tort as well as "any other theory" upon which liability for a manufacturer may be based. Both additions are sound improvements over the first draft and secure to the measure the important element of timelessness in providing adequate protection to manufacturer defendants.

Section 4—Responsibility of manufacturers

The rather extensive additions to this section defining the products liability responsibility of manufacturers go a long way towards clarifying and adequately limiting the liability of manufacturers. We note with some concern, however, that the previous draft would have permitted a defendant's attorney to request that the court render a preliminary judgment of nonliability where the plaintiff has failed after the presentation of its evidence to establish a prima facie case of products liability. Under Draft 2 provisions, all products liability cases pursued through litigation would presumably go to the jury. As provided in Section 4(a)(2) "The claimant must introduce sufficient evidence to allow a reasonable person, by a preponderance of the evidence, to make the determinations specified in paragraph 1. . . ." We believe, in light of the technical issues associated with any potential products liability case, that the court should have the power to terminate a suit after the presentation of evidence where, as a matter of law, defendant liability has not been established.

On the other hand, the express limitation regarding "expert opinion" added in the second draft is a decided improvement and should substantially enhance the probability of liability being assessed more accurately. What is "substantial" objective evidence in any case—the required corrroboration for expert testimony—perhaps necessarily is somewhat uncertain. However, the requirement for such evidence is applauded by the Institute and its member companies.

Section 6—Relevance of government standards or specifications

We are pleased to see that considerable recognition is given to government standards in assesing liability in products liability actions. Some of the changes in Draft 2 prompt certain observations:

1. What is the substantive difference between federal standards and those of state or local government? If, as we suspect, there is little difference then should not the products liability defense outlined in Section 6 be extended—not merely permitted—to cases involving state or local standards as was contemplated in Draft 1? With a "new federalism" emerging, we think the failure to mandate the inclusion of state and local standards within the defense is a backward step.

2. While the first draft provided an absolute defense to contractors who complied with a standard of either the National Highway Traffic Safety Administration of

the Department of Transportation or the Federal Drug Administration of the Department of Health and Human Services, the second draft, eliminating references to the aforementioned, provides an absolute defense *only* in "failure-to-warn" cases where compliance with "Federal legislation prescribing specific warning or instruction language or symbols" has been complied with. We are inclined to believe that the term "legislation" should be replaced with "regulations." If our assumption is correct, the provision has been substantially expanded from that in Draft 1 and is therefore an important improvement in "failure-to-warn" cases. Nevertheless, the defense offered to manufacturers in "design" cases is still only a rebuttable presumption.

In the area of compliance with government contract specifications, we again express our concern regarding the validity of not mandating the inclusion within the defense of compliance with specifications provided in state and local government contracts. However, the inclusion of "construction" based products liability actions within the reach of the absolute defense in the case of federal (and perhaps state and local) government contracts in a decided improvement. We are inclined to believe that the defense ought also to be available in cases involving allegations of defective warnings or instructions, which cases may have been those contemplated in the earlier language currently referring to federal "legislation."

Section 7—Comparative responsibility

We support the elimination of the severability provision included in the first draft which stated "If a party is responsible for a distinct harm or if there exists some other reasonable basis for apportioning the responsibility for harm caused by a party on an individual basis, damages shall be apportioned severally." Elimination of this provision renders more reasonable and functional the remaining provisions of Section 7.

Similarly, we support the specific inclusion of the claimant in the reallocation process that may be initiated within one year after a judgment is entered where a claimant has not been able to collect fully on a products liability judgment. If in the original judgment the claimant's action or inaction has been determined to be a mitigating factor regarding the liability of the defendant, the same factor ought to be recognized in any reallocation subsequent thereto.

Section 9—Effect of worker compensation benefits

Draft 2 includes two major addtions to the provisions governing the relationship between workers' compensation programs and products liability cases. The first addition, paragraph (a) states as follows: ". . . If a person eligible to file a claim for worker compensation benefits has not filed such a claim, the trier of fact shall determine at the time of trial the amount of worker compensation benefits to which the claimant would be entitled in the future or the amount to which the claimant would be entitled if the claimant had filed a worker compensation claim." This new provision will clearly have the effect of encouraging employees to utilize the already existing workers' compensation system, thereby reducing the transaction costs associated with workplace products liability claims.

The second major addition provides as follows in paragraph (d): "No person entitle to file a claim for benefits pursuant to applicable State or Federal worker compensation laws or who would have been entitled to file such a claim, or any other person whose claim would be derivative from such a claim, shall be allowed to recover in a product liability action against a present or former employer or worker compensation insurer of the employer or any coemployee for harm caused by a product." This new language is presumably intended to eliminate or prevent certain types of products liability suits against employers which have been recently emerging under varying legal theories of liability. For example, in some cases, where the employer has also been the manufacturer of the equipment causing the injury or where the employer has been self-insured, the employee has been permitted to sue the employer as either a manufacturer or an insurer, respectively. Such "end runs" on workers' compensation are totally inconsistent with the purpose and intent of the workers' compensation system which benefits both employer and employee. The new paragraph (d) is, we believe, an important addition to this vital section of the proposed act.

Section 10—Time limitation on liability

For reasons outlined at the beginning of our statement, we strongly suggest that some definite cutoff date be identified where liability for the manufacturer will cease to exist with regard to a specific product. In this regard, may we urge:

1. A general statute of repose of 10 years; coupled with
2. and exceptional statute of repose period of 20 years if

(a) The harm of the claimant was caused by the cumulative effect of prolonged exposure to the allegedly defective product; or

(b) The harm did not manifest itself until after the expiration of 10 years.

Concerning the 25-year "statute of repose" provided in the second draft, we note with some concern that the statute would be applicable only to cases based upon alleged failure to design a safe product or to provide adequate warnings or instructions. So called "construction" defects are not covered under the new section. Query, if a product has worked well for 25+ years, can a "construction" defect, by definition, be present? In such cases has not the purchaser obtained the value he sought in the product purchased? We feel that construction defect cases should be included within the parameters of Section 10.

It should also be pointed out that if Draft 2 with respect to a statute of repose, there is no coverage of consumer products. This represents a change from the prior draft, and we call the attention of the Subcommittee to our feeling that in appropriate situations consumer products are deserving of reasonable protection under a statute of repose as well as capital goods, which are understandably addressed in a most direct manner by the present language.

Section 11—Punitive damages

In the very controversial area of punitive damages, the second draft of the proposed act has taken several steps in the right direction, requiring a showing of "outrageous conduct" and "extreme departure from accepted practice" to support an assessment of punitive damages in a products liability case. However, this section, like it predecessor in Draft 1, runs the risk of introducing federal authority for the award of punitive damages in jurisdictions where such damages are not now recognized.

Being appreciative of the significant improvements in Draft 2 regarding punitive damages, the Institute continues to believe that if punitive damages are to be used as an instrument of punishment in a civil action—and we believe that there is a legitimate argument to the contrary—there must be some reasonable limit placed on such awards. This is particularly true of course where a single manufacturing "mistake" unwittingly repeated results in a series of essentially identical but separate products liability actions.

Professor David G. Owen of the University of South Carolina Law School Faculty, and a recognized authority in the field, has drafted a punitive damages provision which we provide below. We recognize that portions of Professor Owen's provision have been adopted in Draft 2 and are hopeful that others can be implemented through succeeding legislative drafts. We are particularly interested in any final enactment of this type including limits on punitive damages both in the individual case and in all cases involving the product in question.

"(a) Following a determination of the product seller's liability for actual damages and the amount thereof, and following a determination of all post-trial motions thereon, punitive damages may be sought by a claimant upon motion to the court. If such damages have been properly pleaded, are awardable under State law, and are not otherwise inappropriate as a matter of law, the court, sitting without a jury, shall thereupon take evidence relevant to liability for and the amount of such damages.

"(b) A product seller shall be liable for punitive damages only if the court determined that in selling the product in violation of section 4 or 5—

"(1) The product seller acted with a flagrant indifference to product safety; and

"(2) The violation of section 4 or 5 was an extreme departure from accepted practice.

"(c) If the court determines that the product seller should be liable for punitive damages, it shall base its determination of the amount of such damages, subject to the limitations in subsections (d) and (e), upon a consideration of the following—

"(1) The likelihood that serious harm would arise from the misconduct of the product seller;

"(2) The extent of the product seller's awareness of the likelihood that such harm would arise;

"(3) The profitability of the misconduct to the product seller;

"(4) The duration of the misconduct and any concealment thereof by the product seller;

"(5) The attitude and conduct of the executive officers of the product seller upon discovery of the misconduct, including whether or not the misconduct was thereupon promptly terminated;

"(6) The financial conditions of the product seller;

"(7) The total effect of other punishment imposed and likely to be imposed upon the product seller as a result of the misconduct, including any compensatory and punitive damage awards to persons similarly situated to the claimant and any criminal penalties to which the product seller has been or may be subjected; and

"(8) Whether the harm suffered by the claimant was also the result of the claimant's own reckless disregard for personal safety.

"(d) The amount of punitive damages that may be recovered by one claimant may not exceed, but may be less than, twice the amount of actual damages the claimant is determined to have suffered, but in on event shall an award of punitive damages exceed $1 million for any one claimant.

"(e) If the product seller proves that it has previously paid or been finally adjudicated liable for punitive damages and fines totalling the lesser of $5 million or five percent of its net worth, its liability for punitive damages shall not exceed the lesser of—

"(1) Claimant's litigation expenses, including reasonable attorneys' fees; or

"(2) The amount determined under subsection (d).

"(f) Notwithstanding the provisions of Section 12, a product seller may introduce relevant evidence of postmanufacturing improvements in defense of punitive damages."

Section 12—Subsequent remedial measures

This provision, although praiseworthy in intent, tends to get absolutely nowhere by marching up the hill and then marching right back down again. It would bar admission of "evidence of measures taken after an event, which if taken previously would have made the event less likely to occur . . . to prove liability under this Act in connection with the event." (This is, of course, what most students of the problem had once supposed the law to be.) The Draft 2 provision then goes on to sy that this general rule ". . . does not require the exclusion of evidence of subsequent measures if offered to impeach testimony proving—(1) ownership or control of a product; or (2) feasibility of precautionary measures."

Where the trier of fact is a jury, its members cannot be expected to distinguish between the purposes for which such evidence is admitted. In our judgment, evidence of this character should not be admitted for any purpose except perhaps regarding defense of the assessment of punitive damages, and accordingly, we recommend that the last paragraph in the draft proposal be stricken.

This concludes our statement on staff working Draft 2 of the proposed federal tort reform legislation. We reiterate our support for the general thrust of the proposal. If the Institute can be of any further assistance to the Subcommittee we hope that you will call upon us.

STATEMENT OF T. E. NORTON, CHAIRMAN, GOVERNMENT AFFAIRS COMMITTEE, AMERICAN SUPPLY ASSOCIATION

Mr. Chairman: Thank you for providing the American Supply Association the opportunity to present our views on national product liability legislation. Your own role in generating interest and drafting legislation in the area is greatly appreciated by ASA as well as a broad spectrum of American business. I am certain you are aware of the role of the Product Liability Alliance, of which we are members. Our goal is to work with you in developing a bill this year. This hearing, which is designed to consider the need for national legisltation rather that to discuss the specifics of proposed drafts, is an important step in this direction. We are pleased to participate.

In November, ASA commented on draft No. 1 and stated in detail our reasons for wanting legislation in this area. For the record, I request that it be incorporated in our testimony at this time:

We believe that this letter outlines our interest in a federal product liability statute sufficiently for the moment. On the other hand, we nonetheless wish to take the opportunity to comment on draft No. 2 and are particularly interested in Section 5, entitled "Responsibility of Other Product Sellers."

ASA is pleased with many of the changes that you have made to reduce the exposure of wholesalers where there is an absence of actual fault on their part. We continue, however, to be disappointed in Section 5(b). As participants in the Product Liability Alliance, we took part in commenting on that section. We objected to the continued imposition of absolute liability when the responsible manufacturer is out of business or not subject to process. While we recongnize your dilemma—somone should be responsible for paying a claimant injured by a product—we simply do not believe it is any more fair to arbitrarily impose liability on a faultless wholesaler, simply because he merely handled the product, than it is to permit an injured claimant to go uncompensated. Is it just to simply substitute one wrong result for another?

ASA will continue to press you to revise this section. Yet we will proceed in the same cooperative spirit that has prevailed in our discussions thus far. We want to assist you in reporting an acceptable bill from your committee this year. We look forward to further hearings aimed at refining your staff drafts and marking up an industry-supported bill. You may be assured of our continued input during these proceedings.

American Supply Association,
Chicago, Ill., November 11, 1981.

Hon. Robert W. Kasten, Jr.,
Chairman, Consumer Subcommittee, Committee on Commerce, Science, and Transportation, Russell Senate Office Building, Washington, D.C.

Dear Senator Kasten: The American Supply Association is privileged to have this opportunity to comment on draft legislation for product liability reform. As wholeaslers of plumbing-heating-cooling-piping products, our concerns may be less obvious than those of manufacturers but, in the wake of a staggering number of lawsuits incorporating wholesalers as defendants, is no less intense.

We understand the role that product liability law has in providing restitution to buyers of faulty products or the victims of negligently-made equipment. We do not ask the Committee to turn back the clock. What ASA does seek is some level of uniformity and fairness in a process that has tremendous impact on our businesses. We want certainty in the application of product liability and equity in its enforcement. ASA members want to know where they may be liable and they want to be secure in the knowledge that the law is fair. For these relatively basic reasons, ASA commends you for your leadership in attempting to develop legislation in this area.

UNIFORMITY

The host of state statutes in this area creates the fundamental problem with existing law. As you have noted in your explanation of the draft bill, "product liability" incorporates a variety of areas in the law: strict liability in tort, negligence, breach of warranty, failure to warn or instruct, or misrepresentation. Multiplied by fifty different state statutes in each of these areas, standards vary, liability attaches and confusion reigns.

An ASA wholesaler may distribute in several states but, more importantly, he is certain to handle products manufactured in a great number of states. The P-H-C-P wholesaler is faced with the application of a potenially different series of product liability statutes in every single jurisdiction where he does business, where his products are manufactured and where P-H-C-P equipment is shipped. Unlike many products where there is little about its characteristics that could inspire product liability actions, our products seem prone for application of these statutes.

The answer then is to establish one body of law upon which consumer, manufacturer and wholesaler alike can rely, to establish the groundrules for product liability in federal law and apply the law uniformly.

Some may view this as an intrusion on the states' prerogatives—we think not. Product liability is not a states' rights issue, it is an interstate commerce issue. The problems created by application of multiple statutes which in turn hamper trade among the states lies at the very core of why the drafters of the Constitution included an interstate commerce clause: to give businessmen the assurance that they need in order to conduct their business across state jurisdictions, wherever a uniform approach is necessary.

ASA believes that such a uniform approach has become necessary.

FAIRNESS

ASA also believes that the standards themselves must be fair. In the past, many states seem to have adopted an "ability to pay" notion that has superceded the question of whether a manufacturer or wholesaler should be ascribed liability in the first place. Who can best pay for these damages: consumer, manufacturer or wholesaler? This question appears to lie at the heart of many strict liability statutes.

However standards must be reasonable. A product liability law must require that manufacturers take basic steps of care in the design and crafting of their product. Wholesalers and sellers must be held to account for their own negligence—negligence that falls within their direct span of control. And, consumers must meet certain demands on their own conduct so that they too use care in selecting and using a product. In other words, ASA looks to the Committee for balance and good sense in fashioning any product liability law.

Finally, the parameters of application of the law must be clear. The law should not permit the mass inclusion of parties defendant, leading in turn to expensive litigation costs, where the absence of liability should be clear from the start. Litigation must be limited to those parties where liability could reasonably attach. [It is one criticism of the draft that wholesalers would be routinely included as defendants to guard against the often-remote eventuality that the manufacturer should prove judgment proof.]

CONCLUSION

ASA strongly supports the intent and direction of the subcommittee's draft. We urge you, Senator Kasten, to continue to pursue our mutual goals of uniformity and fairness. For the present, ASA will be working with others to assist in advancing your bill and to provide the technical input that you will need to perfect this first draft.

As the legislation proceeds to hearings, please feel that you can call upon us for any role that you may consider appropriate.

Sincerely,

JAMES BUGDEN,
Cochairman, Government Affairs Committee.
T.E. NORTON,
Cochairman, Government Affairs Committee.

STATEMENT OF AMERICAN TEXTILE MANUFACTURERS INSTITUTE

As a trade association representing eighty-five percent of the textile industry, the American Textile Manufacturers Institute, Inc. (ATMI) believes that our industry has been unfairly subjected to substantial variations in product liability law made by courts of some states. There is, in fact, such a conglomeration of results from case to case that there seems to be few controlling principles. States now have substantially different standards for product liability. Textile manufacturers serve a national market with their products and they are thus confronted with a confusion of laws which can be dramatically different depending on where the product was manufactured, the sale transaction took place, the purchaser resides, the injury occurred or the suit is brought. For this reason, ATMI supports federal legislation to bring uniformity and certainty to product liability law, which hopefully will bring some stability to what has become a serious burden on interstate commerce and relieve manufacturers from excessive costs.

By stabilizing the major areas of product liability tort law, we believe it would benefit the economy by improving the ability of manufacturers to design more technologically innovative products and distribute them in a wider national and international market spectrum. Our principal problem is that despite the existence of a national standard for flammability of apparel fabrics, this standard is not applied by the courts for product liability purposes. The lack of such a standard means that manufacturers and insurers are unable to assess their potential liability, and in many instances are not induced to improve their products. Consequently, consumers ultimately incur the costs of product liability judgments and are handicapped in their attempts to recover legitimate damages.

It is important that an industry's obligations and responsibilities be clarified. In some states, manufacturers are responsible for injuries from a product even when the injured consumer or worker misused the product. This liability will exist as long as the product is being manufactured and sold. Providing uniform provisions under which manufacturers would be liable will encourage the design, manufacture, and distribution of products which meet such standards.

ATMI does not believe a Federal Products Liability Law should attempt to govern commercial transactions. Commercial loss caused by product failure can be a matter of tort law (negligence, recklessness) as well as "contract" law (breach of implied or express warranty). Essentially the proposed product liability legislation attempts to encompass commercial lawsuits regulated by the Uniform Commercial Code and contract law. We feel commercial transactions should continue to be governed by traditional regulations created to reflect commercial expectations.

ATMI has other specific concerns about the legislative draft language on this issue which were directed to this subcommittee in December of last year. Generally speaking, however, ATMI believes uniform federal legislation is necessary in order to alleviate the burdens on consumers and manufacturers from state-to-state conflicting product liability laws. Therefore, a balanced and comprehensive approach in solving this *national* problem is the only available avenue which would effectively solve the problem once and for all.

STATEMENT OF MARIA DENNISON, DIRECTOR OF WASHINGTON OPERATIONS, SPORTING GOODS MANUFACTURERS ASSOCIATION

Mr. Chairman, the Sporting Goods Manufacturers Association represents members of primarily small businesses. Sales of the majority of members range from $1–20 million. The majority, being small business are highly vulnerable to the present imbalances in the scales of justice in the products liability arena. In fact, the risk of sport as a business has become greater than the sport itself.

Our member manfacturers are experiencing a burden in litigation costs resulting from the current strict-liability oriented system involving product claims. Moreover, the Doctrines of Entitlement and Strict Liability have come full cycle to kick the consumer right in the pants.

While Congress has resolved one major part of the product liability problem in passing the Risk Retention Act, there still remain small businesses who can be wiped out by one large lawsuit. Others do not have the capitalization resources to self-insure or pool together, with various state laws: (1) dictating a manufacturer, liable for products not produced by him, and (2) prohibiting manufacturers introducing evidence to show proper design and no contributory fault.

Of the $19.8 million in jury-awarded judgments against football helmet manufacturers and school districts, in 1980–81, more than one-half of the money awarded the injured players, paid for the cost of the lawsuits and attornies fees. In addition, each case has taken an average of 5 years to bring to a verdict, plus 2 to 3 years for an appeal. In essence, an injured athlete must wait 8 years to find if he/she has won or lost. And while the courts are awarding fortunes to some, others get absolutely nothing. Mr. Chairman, when there is no guilt, is it the intention of the Tort system to offer a sacrifice to *ease* the social conscience?

A meaningful and fair federal product liability law ought to:

(1) Provide for a system of comparative fault.
(2) Establish a reasonable statute of repose.
(3) Codify a state of the arts defense.
(4) Limit contingency fees.

Out of the 13 football helmet manufacturers, 7 remain in business. Of these 7 only 1 company has publicly stated they will remain in the business through "thick and thin". Seventy-five severe cases relating to injuries on the football field are waiting to be tried. Profits from helmet and face mask manufacturers is no more than $1 million on gross sales of $25–35 million. The crisis is not that there are more accidents causing injury and damage. As a matter of fact, reports are to the contrary. The crisis is that the reward for injury has escalated dramatically. Results: Schools are dropping sports, manufacturers are dropping product lines (in some cases dropping out altogether), and retailers and sales agents are saying, "Wait a minute . . . I can lose everything just by being involved in the process?" Consumers are paying through increased prices, lost programs, and services.

Since football supports a good piece of the athletic budget in the more than 15,000 high schools and 3,000 colleges around the nation, we must conclude that without a new source of funding a good portion of the entire athletic program in schools is in question. This is not hyperbole, this is economic fact. Astonishingly, all this comes at a time when serious football injuries are down 55 percent the last decade according to Dr. Voight, Wayne State University, an acknowledged expert on such matters. However, football is not the only sport that is sustaining direct frontal attack by the plaintiff bar. Hocky, skiing, camping and many others are also under attack. These attacks on entire industries will continue to escalate monthly to unprecedented levels until solutions are enacted. Success breeds success . . . and the plaintiff attorneys are enriched and encouraged not only by victories in court, but outright capitulation by the defense in an astounding number of out-of-court settlements.

The Seattle school district in Washington State was sued by an injured player whom a jury awarded $6.3 million because the coach neglected to tell of the risk involved in playing football. A prominent Seattle school board member has asked for a complete review of the entire school sports program, suggesting the cancelling of all "high risk" sports, to include baseball, football, wrestling, etc. The District insured for only $5.5 million is seriously considering the proposal as a result of the

$6.3 million damage award, and fear of exposure to future product liability litigation and the costs incurred.

Mr. Chairman, 'assumption of risk', does not negate negligence. It makes the person best able to prevent an accident accountable. The tort litigation system in the U.S. today, does not operate on this principle. At present, the risk of doing business, precludes being in business.

It is important to remember that no legislature has initially enacted strict liability in tort-strict liability in tort is court-made law. State action, also, has not solved the products liability problem to this point, and by the time we are able to pass a patchwork of conflicting rules and regulations for all 50 states, a lot of us may be out of business. As Congress is continually looking for ways to reduce the number of our unemployed, it would seen reasonable for the Congress to pass legislation to preserve jobs and not put people out of work.

Finally, Mr. Chairman, because of the fear of unwarrented product liability suits, insurance costs, and the economy's inflationary pressures, small and medium-sized businesses are hesitant to invest in new product research and development. Using the football helmet manufacturers as an example, again, many are finding that schools are reconditioning helmets in lieu of ordering new items. This slows down the overall growth of a product and its sales, while causing any new product item costs to increase. For all businesses, this means looking at the profitability of an entire operation, or a product line if it has a multi-product line, and deciding whether it is worth continuing to produce.

In summary, this is why we need a meaningful, federal, uniform product liability bill—one that allows manufacturers to know their responsibilities and obligations, and consumers, their legal rights.

STATEMENT OF THE NATIONAL LUMBER AND BUILDING MATERIAL DEALERS ASSOCIATION

The National Lumber and Building Material Dealers Association is pleased to present to the subcommittee our views on the extremely complicated and sensitive issue of Federal product liability reform. The Staff Working Draft Number 2 represents a realistic approach and alternative to the diverse set of state laws which currently govern product liability litigation. NLBMDA congratulates Senator Kasten and his staff for their diligent efforts to draft a uniform Federal product liability law with the objective of assisting in the regulation of interstate commerce by restoring predictability, equity and stability to the product liability system.

The National Lumber and Building Material Dealers Association is a national trade association, consisting of twenty-five federated regional, state and metropolitan associations of retail lumber and building material dealers. Our member dealers, totaling some 11,000 in all parts of the nation, supply building materials to the home building, general contracting, remodeling and building maintenance industries, and to the general public. By every definition of the word, our federated lumber and building material dealers are small businesses.

Many NLBMDA members act as manufacturers, in some instances, fabricating products such as roof trusses for sale to building contractors and individual consumers. For the most part, however, NLBMDA members function as distributors or retailers, and it is in this context that NLBMDA's comments will be offered.

NLBMDA supports the approach of Staff Working Draft Number Two for two primary reasons. First and foremost, the draft greatly lessens potential product liability for retailers and secondly, the draft established a uniform, Federally-preemptive statute for the product liability issue.

NLBMDA enthusiastically supports the concept of a single uniform Federal law to govern a product seller's responsibility for harms caused by his product. The current system of product liability laws, which are established almost exclusively by state courts, must be replaced to eliminate not only the "patch work" design of varying state laws, but also to eliminate the unpredictability of single state product liability decisions which are applied retroactively.

A number of our lumber and building material dealer members, who are not engaged in interstate commercial activity, have received legislative relief from the enaction of product liability reform laws which provide certain exemptions for retailers in the state. However, the great majority of our dealer members remain vulnerable to strict product liability laws either because of the interstate nature of their business activities or because their state governments have not adopted product liability reforms. It is an ironic situation which exists in the state governments' approach towards reforming product liability laws. Should an individual state develop a comprehensive approach to the product liability issue, because of the interstate nature of manufacturing, distribution and retailing of products, the effect of the comprehensive liability reform would serve as a disadvantage only to the consumers within that state. Certain protections would not be provided to those manufacturers or retailers whose goods had crossed state lines. Clearly, a uniform Federal law, which would exempt certain provisions of state product liability laws, is needed.

The lumber and building material dealer industry, which is small business in nature, supports the draft legislation in that it would correct problems in strict state liability tort law which are particularly acute to small businesses. Since a small business traditionally lacks the financial and managerial capability to self insure, the bill, if enacted, would greatly alleviate liability insurance costs. The reduction of insurance costs would benefit not only businesses but the consumer as well, since it is the consumer who ultimately pays for any insurance cost incurred by the business.

Most importantly, the draft legislation would reduce the number one challenge to the entrepreneurial success of a small business, that, of course, being uncertainty. NLBMDA submits that a constantly changing series of product liability decisions by various state court systems throughout the country does not in any way create a stable and predictable business environment for our dealers.

Faced with alarming increases in liability claims, legal and insurance costs, our industry questions the logic of basing such a significant economic issue solely in the state court systems. The more the issue of product liability becomes entangled with broad social and economic concerns, the more is the need for legislative remedies.

We believe the present state product liability tort law system is simply not working. This product liability system has repeatedly shown that it is wasteful and costly to both the businesses and the consumer. Serious questions remain unanswered concerning current laws. Is the tort law system being transformed into a system of accident compensation? How can a product liability tort system, which changes almost daily as a result of various state court decisions, provide any stability in business and insurance costs to the average businessman? Because of several legal decisions best exemplified in recent cases in California and New York, does the current product liability system actually serve as a disincentive for producers to adopt new safety measures in their products?

The answer to these complicated legal questions are not easy. However, adoption of a Federal product liability law based upon the subcommittee's working draft would certainly assist towards accomplishing the interrelated goals to reducing costs to businesses, encourage the manufacturing of safer products and provide more clear and reasonable guidelines than what currently exists under the state tort law system.

Because of our industry's role as distributors or retailers, NLBMDA is particularly interested in Section 5 of the Staff Working Draft Number 2, which relates to the individual responsibility of product sellers other than manufacturers. This section relieves retailers from liability in the absence of an express warranty to the contrary or the seller's own lack of "reasonable care" in the handling of the product. Subsection 5(a)(3)(A) states that:

> "The trier of fact may consider the effect of the conduct of the seller with respect to the construction, inspection or condition of the product, and any failure of the seller to transmit adequate warnings or instructions about the dangers and proper use of the product."

As subsection 5(a)(3)(B) reads, the retailer is relieved from liability where, for example, the product is in a sealed container and there is no way for a retailer to be aware of the condition.

NLBMDA does not believe that these two subsections of the proposed bill are consistent since the Act's language talks earlier in terms of the exercise of "reasonable care" by the retailer and later refers to liability exemptions for prepackaged products. NLBMDA believes that this possibly conflicting language imposes an unreasonably difficult burden on retailers, since, absent of court decisions, they will not know what kind of care constitutes "reasonable care" for the purpose of relieving them of liability for a product which later causes an injury.

This is particularly important since all NLBMDA members sell a variety of products which are not distributed in sealed containers. As a practical matter, the retailer does not have an opportunity to inspect these products prior to purchase since they are often ordered from a supplier's catalogue or through a sales representative. Additionally, when the product is delivered, inspection is limited to ascertaining whether a particular shipment contains that which was ordered. Because of the bulk of many of the products which we are discussing, they are usually off-loaded directly into the dealer's storage yard or warehouse, without the opportunity for an inspection.

Finally, even if the opportunity for inspection were present in some of these products, the "reasonable care" standard makes it virtually impossible for a retailer to (1) know what kind of inspection to carry out, and (2) know how to deal with the manufacturer whose product is found to contain some sort of defect.

NLBMDA therefore urges that Section 5(a)(1)(A)(ii) by rewritten to remove the "reasonable care" standard. Thus, Section 5(a)(1)(A)(ii) would read as follows:

"In the absence of express warranties to the contrary, other product sellers shall not be subject to liability in circumstances where they do not have a reasonable opportunity to inspect the product in a manner which would reveal the existence of the defective condition."

NLBMDA also objects to the provisions of proposed Section 5(b) which, notwithstanding the provisions of the previous section, would impose liability on the retailer if the manufacturer is not subject to service of process or the court determines that the claimant would be unable to enforce a judgment against the product manufacturer.

This subsection is an obvious attempt to balance what the drafters consider to be the equities of a product injury situation so that someone is held liable. NLBMDA believes that this is not the proper approach and that changes should be recommended in service of process statutes and rules to make it easier to serve out-of-state defendants; also, NLBMDA believes that some consideration should be given to Federal financing of injury claims caused by manufacturers which subsequently become insolvent.

In short, NLBMDA believes that the better approach is to follow the Nebraska statute, which flatly exempts non-manufacturer product sellers from liability unless they have been negligent. While this may seem to be simplistic, it does remove from liability a party who is simply not able to exercise any influences on the construction or design of the product. Adoption of an approach outlined in subsection (b) will only serve to force all retailers to continue to pay excessively high prices for product liability insurance coverage, and thus pass their costs along to the general consuming public.

In conclusion, NLBMDA supports the draft legislation with some limited modifications. We recognize that the working draft strikes a reasonable balance between needed consumer protection and defined liability for businesses. If passed, the draft legislation will effectively serve as a screening device to remove many product liability claims that are unjustified, while not blocking any truly legitimate action by consumers.

STATEMENT OF THE NATIONAL TOOLING & MACHINING ASSOCIATION

The National Tooling & Machining Association represents the 12,500 companies and approximately 250,000 workers in the contract tool and die industry. NTMA members are small businesses. They employ an average of 25 to 30 people and do an average of $1.5 to $2.5 million in net sales per year.

Our members purchase machine tools in order to manufacture dies, molds, jigs, fixtures, gages, special machines, and precision production parts. They consequently look at product liability from both the manufacturer's and product seller's viewpoint. They support this legislation because it is fair and balanced. It provides a uniform and sensible solution to what has become a frightening problem.

Our members are frightened because they don't know what their product liability is. They are frequently second, third, or even fourth tier subcontractors. They don't always know what piece of machinery their product will end up in, never mind which state. There is no way for them to know their responsibilities under 50 separate, frequently conflicting, state laws. At a time when judicial decisions seem to be going not only outside the intent of the law but outside of common sense as well, our members feel they have good cause to be frightened.

One example may help underscore why our members are concerned. The case, filed in California in November 1977, came to trial in March 1981. Our member, Accurate Manufacturing Co. of Chicago, Illinois, became aware of the case when served as Doe III in September 1979.

In November 1976, the plaintiff lost eight fingers in a power press brake manufactured by Dreis & Krup, also of Chicago. Our member had designed and built a set of curling dies for the Western Lighting Corporation of Los Angeles in 1970. These dies were in the press at the time of the accident. The press had been in use, without incident, for approximately six years prior to the injury.

The die was furnished with a spring loaded nesting gage which, had it been in place, would have prevented the accident. Some unknown person had removed the gage and modified it to be used as a back gage on the same die.

The plaintiff's attorney tried to convince the jury that the die had been received without the nesting gage. As parts of the gage, though modified, were still attached, he was unsuccessful in this effort.

After one and one-half days of testimony, the plaintiff's attorney asked our member if he had attached, in any way, a warning that the die should not be used without the nesting gage. He had not. The jury found Accurate Manufacturing guilty and the rest of the defendants not guilty.

The jury awarded the plaintiff $483,000. It cost Accurate approximately $35,000 in additional legal and related expenses to defend themselves.

The case doesn't end here. After the accident, the plaintiff's employer sent the die to another shop to be used in the same unsafe condition. That shop continued to use the die, without incident, until 1981 when Accurate discovered this fact. Our member wrote the employer offering to furnish the missing gage, at no cost, if they would return the die to Accurate's plant. This was done and the die is still in service.

Totally disregarding the safety of his employees, the employer had allowed the die to be used in an unsafe manner for five years after the injury that cost the plaintiff eight fingers had occurred. Had the accident occurred in Illinois, Accurate would have brought suit against the employer on the grounds that he was negligent in allowing the safety features of the die to be removed and was continuing to expose his employees to an unsafe condition. California law, however, prohibits an employer from being held responsible in this regard.

The basic theory behind the proposed legislation, that the person or company in the best position to ensure safe action should be held liable, is the bill's greatest strength. There isn't a member of our Association that has indicated a desire to escape their legitimate responsibilities. At the same time, however, they disagree with the theory that anyone who is injured, regardless of the part they or their employer had in causing the injury, is "entitled" to compensation from the manufacturer. Our members might not know the law, but they know what's fair. The theory that "there must be someone to sue," regardless of whether or not that "someone" contributed, in any way, to the accident, is unfair.

In an era of interstate commerce, the current patchwork quilt of diverse and conflicting laws prevent insurance companies from setting stable rates and adds to the premium costs of product liability insurance. Product liability insurance rates have risen so dramatically in the past few years that many of our members feel they cannot afford it and are going without. They know they do this at great risk. If they become involved with and lose just one case, they would be out of business.

Though the Risk Retention Act of 1981, passed because of this Subcommittee's efforts, will help bring insurance costs down by introducing greater competition among insurance providers, it does not address the basic problem of uncertainty in the law. Unlike automobile or medical malpractice insurance, product liability insurance rates are formuated on a national basis because of the nature of interstate commerce. This means a manufacturer who loses a case in what might be termed a conservative state will see his premiums rise because of decisions from a liberal state.

While product liability has traditionally been an area reserved for the states, we believe interstate commerce has made it a national issue requiring a federal solution. Precedents do exist for federal involvement in this area. Even if these precedents didn't exist, however, the need for this legislation is so great that it must be supported. It was drafted only because of the realization that the states individually would never be able to develop a comprehensive, unfied solution to this national problem.

The National Tooling and Machining Association strongly supports this legislation because it provides a comprehensive solution to the product liability problem. It balances the rights and obligations of both product users and manufacturers. Further, it creates no new federal agency and involves no federal funds. We thank Senator Kasten for the leadership he has assumed in this area of vital interest and concern to the small manufacturers and to the product user.

STATEMENT OF ROBERT H. MALOTT, CHAIRMAN OF THE BOARD AND CHIEF EXECUTIVE OFFICER, FMC CORP.

It is a pleasure to be here this morning to open the conference on product liability and tort law reform. I am encouraged to see so many people gathered under the auspices of the national legal center for the public interest to talk about what I believe is a critically-important topic.

There will be ample opportunity during this conference to discuss the legalities of product liability and tort law reform. In my remarks this morning, I want to talk about this subject from a different perspective: that of a diversified, multinational manufacturer.

My purpose is to dramatize for you the difficult position that we, as manufacturers, find ourselves in today as a result of the current state of product liability law. I hope my remarks will give you a "real world" basis for evaluating the more technical discussions of issues that will be the core of the conference.

THE NATURE OF THE PROBLEM

First, let me discuss the nature of the problem.

When I began my business career thirty years ago, a manufacturing company knew with reasonable certainty the standards that would be used in determining product liability.

If a consumer injured while using a product could prove that the manufacturer had been negligent, the consumer was entitled to recover damages. To find a manufacturer guilty of negligence, the court or the jury had to determine that the company had failed to act reasonably and prudently.

This standard of liability was easily understood, and was widely perceived as equitable and fair—to both the manufacturer and the injured party.

Subsequently a manufacturer's liability for damages was expanded to cover injuries or harm suffered by a customer using a mechanically-faulty or defective product. Even though the defect was accidental and did not stem from negligence on the manufacturer's part.

Again, both the business community and consumers could agree that this strict liability, or liability without fault, was equitable. The basic standard of liability remained clear—a manufacturer was liable for injuries resulting from faulty products. And business could obtain reasonably-priced liability insurance to cover this definition of liability. As a businessman, I was—and still am—comfortable with this standard of product liability.

In the last 10 to 15 years, however, the concept of liability for products has been further expanded—to the point that a manufacturer no longer knows what limits, if any, there are on liability. Although the lawyers can explain to me, on a case-by-case basis, how the courts have extended the concept of strict liability, they cannot give me any standards that tell me where liability begins and where it ends. This is the crux of the product liability problem as far as industry is concerned.

Let me describe the lengths to which a manufacturer's product liability has been extended.

First, manufacturers may now be liable for products, which though not mechanically-flawed, are considered "defective" because they are dangerous in use. The issue is not whether the product was manufactured according to specifications, but whether its design poses a hazard. And there is no objective, uniform standard which defines what constitutes—quote—"hazardous design"—unquote.

Second, it now seems that there is no time limit on how long a manufacturer may be liable for unsafe conditions associated with use of his products. The fact that product has been operating safely for as long as 30 years is no protection: An injured party could recover damages from the maker in the 31st year on the grounds that the product's design was dangerous.

Third, because a manufacturer's liability covers not only products being used as intended, but also any uses that may—quote—"reasonably be foreseen"—unquote

Whatever that means—a company may find itself liable for injuries, even though the product was misused by the consumer.

The results of the application of these extended concepts of strict liability appear ludicrous in theory, and frightening in actuality, particularly to manufacturers.

For example, in the mid-1970s, the Oliver Machinery Company of Michigan was sued by a Mr. Curtis Hagans. In 1971 Mr. Hagans lost one finger on his left hand and severely injured another, while operating an industrial table saw manufactured by the Oliver Company in 1942, over 30 years earlier. Mr. Hagans' employer was the third owner of the saw. At the time that it bought the saw in 1960, the saw still had its original, removable blade guard. However, when the accident occurred in

1971, the blade guard had been removed. Mr. Hagans admitted at the trial that if the blade guard had been attached to the machine, the injury would have been avoided.

It is obvious to me, in this case, that either Mr. Hagans or his employer was negligent—by not ensuring that the blade guard was in place. In most States juries are not permitted to consider evidence of this type—namely, was the employee or employer negligent in using the equipment? The bias in favor of the plaintiff of this interpretation of the evidence is disturbing.

Mr. Hagans claimed that the Oliver Company was liable for his injury because the saw's 30-year old design was dangerous: He asserted that the blade guard should have been permantly-affixed, instead of removable. In its defense, Oliver argued that a fixed guard would have rendered the machine useless for many common woodworking operations. Furthermore, in 1942, when the saw was built, no permanent guard device was available that would adequately protect the operator during every operation.

Mr. Hagans also claimed that Oliver Machinery should have put warnings on the saw—telling about the hazards of operating the saw without the guard. He admitted, however, that before the accident he was fully aware of the risks of operating the equipment. I ask you: Why should a manufacturer be forced to pay damages because it didn't put warnings on equipment—if the operator is already aware of the risk? How is that going to prevent accidents?

Notwithstanding the flimsiness of Mr. Hagans' case, the jury ruled in his favor and the judge awarded substantial damages.

To cite another example, in 1970, my company, FMC, was sued in Illinois for damages by a worker injured when a heavy equipment operator maneuvered the boom of an FMC crane into high voltage lines. At the trial, FMC was not allowed to introduce evidence that the employer was negligent—because he had not ensured that the power was turned off, nor had he barricaded the power lines to prevent such an accident, both accepted safety practices in the construction business. Instead, the court found the design of FMC's crane to be defective, because it lacked warning devices, and awarded the plaintiff $2.6 million. I might add that such warning devices were beyond the state of the art at the time the crane was manufactured.

At the same time that the courts have expanded the concept of liability, they have also limited the scope of a manufacturer's defenses.

For instance, in some States the fact that a product conformed to all governmentally-established safety standards is not admissible as relevant evidence in a suit where the safety of a product is at issue.

And, in a few States, the claimant can even use the fact that a manufacturer subsequently made modifications or improvements to a product to support a contention that the earlier model was not safely designed.

For example, International Harvester was sued in California by a man injured when his four-wheel drive Scout veered off a road and plunged 500 feet into a canyon. The claimant argued that he lost control when the aluminum steering gear box broke apart. Harvester argued that the gear box was broken by the plunge into the canyon, and that it was not the cause of the accident.

The case required two trials. The first trial resulted in a "hung" jury, unable to determine from the available evidence whether the aluminum gear box caused the accident. During the second trial, the claimant's lawyer changed tactics and constantly emphasized that three years after the accident Harvester substituted malleable iron for aluminum in the manufacturing of Scout gear boxes. One does not need to speculate too long about the prejudicial impact of this evidence: The result for the plaintiff was a favorable judgment, and an award of $700,000.

IMPLICATIONS FOR SOCIETY

These developments in product liability law have staggering implications. Let me address four points of concern.

First, determinations of liability have been moved from the realm of the relatively objective to the substantially subjective.

If liability can result from a product's design, the courts must determine what constitutes a hazardous design. If liability results from inadequate warnings, the courts must decide what constitutes sufficient warning. The courts, however, are invariably not experts in these matters. Yet, they are required to render an evaluation—in hindsight—of an informed decision previously made by a manufacturer.

This raises two very serious questions.

Are courts or juries capable of performing these functions? And, Will it be possible for manufacturers to interpret case decisions in a way that informs them of the adequacy of their products' designs or warnings?

I am not sure that either of these questions can be answered affirmatively.

My second concern is that the burden of proof in product liability cases has shifted. The plaintiff traditionally had to prove that the manufacturer had been negligent. Now, more and more often, the defendant, must, in effect, demonstrate why it should not be judged liable.

Third, because product liability law is applied and developed on a case-by-case basis in each of the 50 States, either a manufacturer varies its product design State by State—obviously an impractical, if not ludicrous alternative—or its product liability exposure varies from State to State.

The lack of uniformity in decisions across States can produce striking differences in liability. For instance, shortly after the Illinois court's judgment against FMC in the crane case, courts in two other States ruled in similar cases, that the manufacturer was not liable, because the hazard of driving a steel boom into high power lines was obvious. Notwithstanding those favorable outcomes—appropriate ones in my judgment—crane manufacturers still face possible liability in any State except New Mexico or Minnesota.

Finally, current product liability law makes manufacturers sometimes hesitant to introduce new products, to modify or improve older products, or to sell products in some markets. Let me cite an example from our own experience.

FMC's power transmission group (now PT Components, Inc.) produces high quality commercial bearings for use as components in machines and equipment built by other manufacturers. As a component manufacturer, FMC has no control over the design of the products into which bearings are placed. If a failure occurs, a claimant may sue the component manufacturer as well as the product manufacturer.

In 1971 we concluded that the potential product liability exposure from the use of FMC bearings in helicopter rotors was too great, given the small share of our market that such uses constituted. We, therefore, issued a directive stating that no orders for bearings would knowingly be accepted for use in manufacturing in-flight aircraft operation and controls.

The defenders of the current product liability system often claim that manufacturers, aware of their potential liability, make better products than they would otherwise. I'm prepared to argue that exactly the opposite occurs: Companies may hesitate to introduce new products because of the potential liability. They may not improve products already on the market, fearing that the changes will be used as evidence that the earlier models were defective. The lesson of International Harvester's Scout case has not escaped notice.

Society as a whole loses when innovation is stifled—as I think is happening—as a result of this aspect of the current product liability environment.

REMEDIES

What kinds of changes in product liability law would improve the environment in which we now find ourselves? Let me make four suggestions.

First, we need to develop clear, practical standards for judging whether or not a product's design and warnings are adequate.

Moreover, we should make negligence a part of the test for design shortcomings. If the claimant cannot prove that a manufacturer acted unreasonably or imprudently in designing a product, then the company should not be liable.

In addition, liability standards for product designs should be consistent with applicable governmental standards, and compliance with those standards ought to be considered prima facie evidence of reasonable care.

Most important, we should only require that the product's design conform to the standards and technologies prevailing at the time the product was manufactured, not to later technological developments.

Ideally these standards should be applied nationwide to ensure consistency of results. I will discuss later the question of whether reform should be pursued at the Federal or State level.

My second suggestion is that we must limit the period of time that the manufacturer is liable for defects or design faults. This would seem eminently reasonable: Defective conditions or unsafe design features do not lie dormant for decades and then suddenly appear and cause injury.

Third, manufacturers should have the right to point out that owners or third parties have altered or misused products. Furthermore, these owners or third parties should be allocated their appropriate share of liability. It's patently absurd that manufacturers are held liable for injuries that result when products are modified and misused in ways that no one contemplated.

Finally, we must reverse further extensions of the concept of strict liability. Let me give you two recent examples: The expansion of the rule of collateral estoppel in asbestos cases, and the reversal of the traditional burden of proof in the *Sindell* case.

As you know, the rule of collateral estoppel States that one an issue has been decided in a suit between two parties, then that issue may not be reexamined in subsequent suits between those parties.

Recently, however, a Federal judge in Texas has extended that rule. He has determined that once it has been established in one suit that asbestos is an unreasonably dangerous product—and the manufacturer is, therefore, liable for damages when a worker develops asbestosis—then in all subsequent suits involving that manufacturer, the claimants do not have to prove that issue again. The effect of this extension of liability, it seems to me, would be to prohibit that manufacturer from selling asbestos. If, in future suits, the company could not attempt to prove that asbestos is a reasonably safe product, wouldn't it be foolish to continue selling it?

Of even greater concern is the possibility that this ruling may be extended to all manufacturers of asbestos. If that happens no manufacturer, regardless of whether or not it had ever been sued before, could claim that asbestos is reasonably safe. The result would be a judicially-forced withdrawal of asbestos from the market.

The *Sindell* case, concerns a woman who contracted cancer, because her mother took the drug diethylstilbestrol (DES) during pregnancy. Unable to identify the manufacturer of the DES her mother took, a California court ruled that she was entitled to recover damages from 6 companies which made 90 percent of the DES produced during that period. It was then up to each company to prove that it did not make the particular batch of DES taken by the mother. If this concept becomes universally accepted, it will completely reverse the traditional rule of evidence requiring the claimant to identify the manufacturer responsible for injury.

While these suggestions do not include all the changes to product liability law that need to be made, they are, from my standpoint, the most important ones.

Parenthetically—and rhetorically—let me ask you two fairly simple questions at this point—

1. Do you think my concerns as a manufacturer are justified, and
2. Are the things that I am suggesting reasonable in light of my concerns?

In the context of the position that I have espoused this morning, I would like to ask you to consider some of the comments presented by a representative of the Association of Trial Lawyers of America in testimony on product liability before Senator Kasten's subcommittee.

"* * * There can never be a need to transfer the cost of injuries from the wrongdoer to the victim"—Is that what I am proposing?

"To enact a National Protection Act for the producers of defective products simply denies every citizen rights, rights won before the courts and the legislatures * * *"—Could the proposal I have outlined be classified as a "National Protection Act for the producers of defective products?"

"Proposals to shift the burden of injuries from the manufacturers or distributors of defective products to the victims of those defects must outrage the conscience of all right thinking persons." Is that an objective evaluation of what I am recommending?

Frankly, these would seem to be emotional outbursts from one whose vested interests are about to be gored.

FEDERAL OR STATE ACTION

Let me turn briefly to the question of whether product liability tort reform should be undertaken at the State level or the Federal level.

The Reagan administration is currently studying this issue carefully. They are trying to determine whether Federal tort reform would be inconsistent with their program of "New Federalism." As you know, the administration has proposed turning over to the States the operation of many heretofore Federal programs. They are concerned whether Federal product liability legislation is consistent with this objective.

Some have argued that the setting of tort law standards is one of those powers reserved to the States under the tenth amendment to the Constitution. Under this "States' rights theory," the Federal Government has had no role in this area in the past and should not have any role in the future.

In general, I am sympathetic to the States' rights argument. The more things that are administered at the State level, the better. However, I truly believe that product liability tort reform is an appropriate issue for Federal action, on both constitutional and practical grounds.

Federal product liability reform is justifiable on constitutional grounds because of the Federal Government's responsibility to regulate and promote interstate commerce. We must recognize that most products today are sold in national or nationwide markets.

Furthermore, I see no inconsistency between Federal product liability reform and the Reagan administration's New Federalism. The administration's program aims to return to local control programs that benefit people in their own State. Welfare is not an interstate commerce issue; product liability is.

Federal product liability reform also makes good sense on practical grounds. We have already tried the State approach to reform, and it has failed. Although thirty-one States have passed a so called reform statute, no two of these are alike. Instead of contributing to uniformity, the passage of these statutes has exacerbated the lack of uniformity.

CLOSING

In closing let me challenge you to do two things.

The first is to work diligently in your conference sessions to iron out the details of product liability reform issues. I hope that, after the debates and discussions in the conference, all those who attended can actively support a consensus bill.

Second, we need to take the case for product liability reform to the public. Conducting the debate on product liability reform among ourselves—in technical and legal circles—is useful, and undoubtedly necessary. Recognize, however, that eventually a far broader audience must support the need for change. You can play a vital role in communicating our objective to that broader audience.

I am confident that the American people will support product liability reform once they understand the issues.

Thank you.

STATEMENT OF THE NATIONAL RETAIL MERCHANTS ASSOCIATION

From their perspective as retailers of a multitude of consumer goods in every state in the union, the members of the National Retail Merchants Association[1] ("NRMA") have concluded that there is a pressing need for federal legislation which defines the basic obligations of manufacturers, wholesalers, retailers, and consumers. Therefore, NRMA welcomes this opportunity to express its support for the enactment of federal product liability legislation and to explain why we believe passage of this legislation is needed. NRMA intends, however, to offer suggestions for changes in several provisions of the staff draft which have a direct effect on retailers when the Subcommittee holds further hearings to examine the specific language of proposed legislation.

There are three major problems which justify passage of federal product liability legislation. The most fundamental and significant of these is that the state-by-state, common law development of product liability law has left this nation with a confused and incoherent body of law. When the country's economy was more parochial, it could tolerate, indeed, it probably benefitted from, this diversity. However, today's economy is characterized by manufacturers and retailers that market products throughout the country. The law must change in response to this basic change in the nature of our economy. If product liability laws are to continue to guide the business community, and encourage the development of safer products, by defining the responsibilities of product sellers to consumers, the law must speak with a more unified and coherent voice. This can only be accomplished by the enactment of federal legislation which establishes the basic framework and rules of product liability law.

NRMA also supports passage of federal product liability legislation because there is an urgent need to define the philosophy of product liability law. Some courts appear to have adopted the philosophy that product liability law should be nothing more than an insurance program to provide compensation for any consumer injury.

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[1] The National Retail Merchants Association is the nation's largest trade association for the general merchandise retail industry. Our members operate 40,000 department, chain and specialty stores across the country. Their annual sales are approximately $175 billion and they employ nearly 3 million workers.

This notion is in sharp conflict with the view that a major goal of product liability law should be to place the burden of avoiding injuries on the party best able to do so. The latter philosophy recognizes, correctly in NRMA's view, that, in the long term, society is better served by a system that encourages consumers, as well manufacturers and retailers, to take steps to minimize the risk of injury. NRMA believes that passage of federal legislation that incorporates this philosophy, and rejects the insurance program philosophy, will benefit consumers, manufacturers, and retailers.

Finally, passage of federal legislation can be justified by the fact that it could result in substantial savings of litigation and insurance costs. Uncertainty breeds litigation because both plaintiff's and defendant's are unsure of their respective rights. It inflates insurance premiums because insurance companies have difficulty predicting losses. These costs increase the price of goods without producing any benefits. Passage of meaningful product liability reform legislation can reduce both litigation and insurance costs, thereby benefitting consumers, by eliminating some of the uncertainty that plagues the law today.

While NRMA continues to have concerns with regard to specific provisions of the draft Act, on the whole, the March 1 staff draft Product Liability Act represents a significant step toward passage of a federal product liability bill. NRMA applauds the Subcommittee's efforts and urges it to move forward quickly in its consideration, and approval, of this worthwhile and needed legislation. NRMA will, at the appropriate time, present comments on the specific changes in the draft Act which it believes are needed.

The National Retail Merchants Association is pleased to be able to support enactment of the Product Liability Act (S. 2631) and would like to commend Senator Kasten, whose efforts have been so important to the development of this legislation, and the distinguished bipartisan cosponsors of this much-needed bill, Senators Lugar, Inouye, Abdnor, Percy, Garn, Stafford, and Glenn, for introducing this legislation. NRMA is the nation's largest trade association for the general merchandise retail industry. Our members operate 40,000 department, chain, and specialty stores across the country which have annual sales of approximately $175 billion and employ nearly 3 million workers. NRMA supports enactment of S. 2631 because there is a pressing need for the enactment of a uniform, national law which defines the basic rights and responsibilities of product manufacturers, sellers and users, and passage of S. 2631 would meet this need.

It should be emphasized, however, that while NRMA endorses the basic features of S. 2631, we strongly recommend that the definition of manufacturer be amended to provide that retailers that sell products under their own lables *not* be subject to liability as a manufacturer if, at the time a case is brought, the retailer identifies the manufacturer of the product. As now drafted, Section 2(6)(B) would treat a nonmanufacturer product seller that "holds itself out as a manufacturer to the user of the product" as a manufacturer. The effect of this provision would be that a nonmanufacturer seller would be subject to the same standards of liability as the actual manufacturer of the product even though it had no role of any kind in the manufacturing process. NRMA recommends that Section 2(6)(B) be amended to read as follows:

"(B) any product seller not described in clause (A) which holds itself out as a manufacturer to the user of the product, unless at the time the claimant brings a product liability action, the product seller identifies the person who actually manufactured the product."

If this provision were enacted, a nonmanufacturer product seller would not be subject to liability under the provisions relating to a manufacturer's liability (sections 4, 5 and 6), so long as it identifies the actual manufacturer of the product at the time a suit is brought. This proposed modification of section 2(6)(B) would reduce the overall costs of product liability actions (which benefits all concerned) without endangering the financial or legal position of the claimant.

The fundamental flaw in section 2(6)(B), as presently drafted, is that it would impose tort liability on a product seller who, in fact, did not contribute in any way to the defect which caused the harm. In addition, even if, as is generally the case, the non-manufacturer retailer successfully cross-claims against the manufacturer for indemnity, the retailer will have incurred significant transaction costs to accomplish in two steps what NRMA's proposed modification would accomplish in one step—that is, the imposition of liability on the party (the manufacturer) that is actually responsible for the defect. These additional costs—which, like all others, are ultimately passed on to consumers—would yield no benefits to consumers.

Further, the proposed modification would not reduce an injured party's rights. Once identified, the injured party could bring suit against the manufacturer. Section 8(f) would protect the injured party in cases in which the manufacturer is not subject to service, or the plaintiff is unable to enforce a judgement. Moreover, if the product seller participated in the manufacturing process (e.g., by designing the product) it would be a manufacturer under subsection (A) of section 2(6); therefore, the question of its status under subsection (B) would be irrelevant. Thus, NRMA's proposed modification would reduce transaction costs without adversely affecting the rights of injured parties.

NRMA's proposed modification also would largely eliminate the concerns many retailers have regarding the lack of clarity in the meaning of the term "holding out." Retailers fear that this term would be interpreted expansively with the result that they would be held to the standards of liability applied to manufacturers. The proposed modifications of section 2(6)(B) would dissipate this concern because nonmanufacturer product sellers could protect themselves from this problem by keeping identifying the manufacturers of their products.

For these reasons, NRMA urges that the scope of the "holding out" provision in section 2(6)(B) be narrowed by adding the language NRMA has proposed.

With regard to the other provisions of S. 2631, NRMA supports the basic thrust of the bill and has only a few suggestions to clarify the meaning of certain sections. From NRMA's perspective one of the most important aspects of S. 2361 is that it would establish separate and distinct standards of liability for manufacturers and nonmanufacturer product sellers. It is unfair to hold a retailer liable for a defect in, for example, the construction or the design of a product when it had no control over either process. Thus, NRMA strongly supports the present structure of S. 2631 insofar as it provides a separate standard of liability applicable to nonmanufacture product sellers.

NRMA also endorses the provisions of Section 8(a) of the bill which would limit a retailer's liability to situations where the injured party could establish that a retailer's failure to exercise reasonable care led to his injury. However, NRMA suggests that Section 8(a) be redrafted as follows in order to make clear that a product seller would be liable only if its failure to exercise reasonable care was the proximate cause of the plaintiffs injury:

"Sec. 8. (a) In any product liability action, a product seller is liable to a claimant, if the claimant established by a preponderance of the evidence that:

"(1) The individual product unit which allegedly caused the harm complained of was sold by the defendant;

"(2) The product seller failed to exercise reasonable care with respect to the product; and,

"(3) The product seller's failure to exercise reasonable care was the proximate cause of the harm complained of by the claimant."

NRMA does not object to retailers being held liable according to the standard set forth in Section 8(b). Under this provision, a nonmanufacturer product seller would be liable for any injury which resulted from a product failing to conform to an express warranty "about a material fact directly relating to the safe performance of the product," if such warranty were independent of any express warranty made by a manufacturer. The term "material fact" is not defined in Section 8, but is defined in Section 7(a) which defnes a manufacturer's liability for the failure of a product to conform to an express warranty. To avoid confusion as to the meaning of this term in Section 8(b), NRMA suggests that the following language used in Section 7(a) be added to Section 8(b) at line 6 on p. 17 of S. 2631:

"As used in this subsection, "material fact" means any specific characteristic or quality of the product, but does not include a general opinion about, or general praise of, the product or its quality."

Also, it would be helpful if language were included in the report on S. 2631 which emphasizes that a product seller does not make an express warranty which is independent of the manufacturer's express warranty when it informs a purchaser, through advertising or otherwise, of the existence or the terms of the manufacturer's warranty. Further, it would also clarify the scope of section 8(b) if a statement were in the report which would indicate that a pledge by a product seller to the effect that "satisfaction is guaranteed or your money back", or similar claims, is not an express warranty "about a material fact directly relating to the safe performance of the product." To treat either kind of statement by a retailer as an independent express warranty would not serve the interests of consumers. If liability were imposed in these situations product sellers would be unwilling to discuss the manufacturers' warranties or to provide general money-back guarantees. While it does not appear to NRMA that Section 8(b) would impose liability in either of these situations, it would be helpful to clarify this matter in the Committee's report.

Section 8(b)(3) provides that a product seller would be liable for injuries caused by a failure of a product to conform to an express waranty if the failure "caused the harm." NRMA assumes that it was intended that the claimant be required to establish that such a failure was the proximate cause of the injury. We recommend that this intent be made explicit by modifying section 8(b)(3) to read as follows:

"(3) The failure of the product to conform to the warranty was the proximate cause of the injury."

NRMA endorses Section 8(d), which bars the application of offensive collateral estoppel, because the application of collateral estoppel against either a plaintiff or a defendant who did not have an opportunity to litigate a product liability issue with a specific party, can create extremely unfair situations. It can result in a party's being held liable when it has not had an opportunity to truly litigate and be heard on the specific facts of the case.

Section 8(e)(1) would authorize the trier of fact to consider certain aspects of a nonmanufacturer product seller's conduct in determining whether the product seller may be liable under either sections 8(a) and (b). The reference to subsection (b), which defines the product seller's liability for injuries caused by the failure of a product to conform to an express warranty, should be eliminated because the conduct listed in (e)(1) is irrelevant to issue of liability under section 8(b).

Section 8(e)(2), which states that a product seller is not obliged to open a prepackaged product to inspect it, would codify the general rule on this point and should be maintained in the legislation.

Senate Bill 2631 includes two alternative sections on time limitations on liability. While NRMA would prefer a statute of repose which provides a definitive end point to a product seller's liability, if such a provision is not included in the legislation, NRMA would support the alternative in the bill which would create a rebuttable presumption that claimant's harm was not caused because the product was unreasonably unsafe in design or because of a failure to provide an adequate warning or instruction if the harm occurred more than ten years after the first sale of the product. Ten years is a reasonable length of time to hold the manufacturer liable for these kinds of defects in consumer products. However, Section 12(a)(1) of this alternative makes reference only to the two standards of liability for manufacturers which base liability on a manufacturer's failure to exercise reasonable care. It would be appropriate to amend Section 12 to include within its scope claims based on an injury allegedly caused by a nonmanufacturer product seller's failure to exercise reasonable care. By so doing, the section would treat a non-manufacturer product seller's failure to exercise reasonable care in the same manner as a manufacturer's failure. NRMA recommends that this alternative of Section 12(a)(1) be amended by adding the underscored language:

"Sec. 12(a)(1). In any product liability action, there is a presumption that the harm of a claimant was not caused because the product involved was unreasonably dangerous because of its design, unreasonably dangerous because of the failure to provide adequate warning or instructions, or because a non-manufacturer product seller failed to exercise reasonable as required by section 8(a), if the harm was caused after the end of the longer of the following periods:"

NRMA appreciates this opportunity to present its views on S. 2631.

STATEMENT OF RALPH T. MILLET, CHAIRMAN, AUTOMOBILE IMPORTERS OF AMERICA, INC.

INTRODUCTION

Mr. Chairman and members of th Subcommittee, I am Ralph T. Millet, Chairman of the Automobile Importers of America, Inc. (AIA), and a Director of Saab-Scania of America. AIA is the association of major automobile importers in the United States. A list of AIA members is attached.

I will limit my prepared remarks today to S. 2631, the proposed "Product Liability Act" introduced on June 16, 1982, by Sen. Robert W. Kasten (R-Wisc.). S. 2631 would establish preemptive federal product liability law. We commend the Subcommittee for its efforts and concur in the following introductory remarks of Sen. Kasten, wherein he explained the need for such legislation.

"The product liability problem reached crisis proportions in the mid-1970's and it continues today. The uncertainty and instability in product liability law has become a major problem not only for manufacturers and product sellers, but also for consumers. Conflicting product liability rules have made it extraordinarily difficult for consumers to know their legal rights and for manufacturers and product sellers to know their obligations. This has created expensive and burdensome legal costs which are passed on to consumers."

AIA generally supports S. 2631, insofar as it: (a) establishes preemptive federal legislation (section 3); (b) provides for the adjustment of damages on the basis of comparative responsibility (section 9); and (c) preserves the incentive of product sellers to take subsequent remedial measures with respect to their products (section 14). AIA supports certain other aspects of S. 2631; in other respects, we believe the bill should be changed. These are specifically discussed in the following statement. I wish to make the following 5 points:

1. there is a need for federal product liability legislation;
2. compliance with federal product standards and specifications should raise a presumption of reasonable product design, warnings, and/or instructions;
3. product liability legislation should include a reasonableness test for determining a manufacturer's or product seller's responsibility for alleged product harm;
4. product liability legislation should prevent the use of offensive collateral estoppel;
5. product liability legislation should establish a "reckless disregard" test for the award of punitive damages and provide for court determination of the amount of such damages.

1. *There Is a Need for Federal Product Liability Legislation.*—The rules determining the liability of product manufacturers and sellers for product-related injuries have been developed almost exclusively by judges on a case-by-case basis. These decisions have been based upon separate laws in each of the fifty states. The result has been not one but fifty separate laws relating to product liability each with its own theories of liability, defenses and procedural requirements. Thus, product liability law is a crazy quilt that is constantly changing, totally unpredictable, and highly inconsistent. This has imposed a significant burden on manufacturers, distributors and sellers of products. This burden cannot be justified on the basis of consumer benefit, since the public is ill served by a complex of laws that is so complicated and inconsistent that the average citizen cannot determine his or her rights to redress for defective products. Consequently, there has been a rapid increase in the number of long and costly product liability lawsuits. This serves neither the manufacturer faced with the threat of highly excessive awards, nor the consumer who must frequently wait for years for the redress of legitimate claims. The groups primarily benefiting from the confused state of the law regarding product liability are attorneys who both prosecute and defend such claims in the courts.

For these reasons, AIA supports the effort to enact a uniform law which would clarify the responsibilities of product providers and the rights of the consumers of products.

2. *Compliance with Federal Product Standards and Specifications Should Raise a Presumption of Reasonable Product Design, Warnings and/or Instructions.*—Staff Working Draft No. 1, released by your Subcommittee last fall, included a provision that compliance with federal and state product safety standards would be deemed to demonstrate reasonable product design, warnings and/or instructions, as appropriate, with respect to the compliant aspect of the product. Staff Working Draft No. 2, released by your Subcommittee in March, included similar language related to federal standards and specifications. S. 2631 contains no such provision. AIA strongly urges that S. 2631 be amended to reinstate this concept. Such an added provision should provide that compliance with federal product standards and specifications raises a presumption of reasonable design, warnings and/or instructions, as was done in Staff Working Draft No. 2.

An increasing number of products are required to be designed and manufactured in conformance with government standards and specifications. Considerable technical expertise and expense are devoted to the development of these standards and specifications by government agencies, and to compliance by manufacturers. Their increasing application has been the result of the public's desire to insure standards of performance and safety with respect to certain products. While such matters may be a legitimate area of public concern and legislation, it is inequitable to require manufacturers to assume the time and expense of such compliance without protection from charges of product liability with respect to the compliant aspect of a product.

3. *Product Liability Legislation Should Include a Reasonableness Test for Determining a Manufacturer's or Product Seller's Responsiblity for Alleged Product Harm.*—Sections 5 and 6 of S. 2631 provide for a "reasonably prudent manufacturer" test with respect to product design and construction, and product warnings or

instructions. In addition, section 8 of S. 2631 establishes a "reasonable care" standard with respect to product sellers.

AIA supports these provisions because it believes that manufacturers' and product sellers' responsibilities with respect to their decisions regarding design, construction, warnings, instructions and/or product handling should be based upon knowledge that they had or should have had at the time of production or product sale. Such provisions would be consistent with a "fault" concept of product liability. The tort system was initially developed to allocate liability on the basis of fault. However, in recent some jurisdictions have moved away from the concept of fault and developed a compensation-oriented system that has eliminated fault as a consideration. This concept of strict liability without fault was originally intended to apply only to manufacturing defects in cases where it would be virtually impossible for a complainant to establish fault due to the nature of the manufacturing process. However, in most cases involving an alleged design defect, or alleged failure to provide adequate warnings, instructions or product servicing, complainants and complainants' experts have a full opportunity to review the product and its design and to present evidence regarding alleged fault on the part of the manufacturer or product seller.

4. *Product Liability Legislation Should Prohibit the Use of Offensive Collateral Estoppel.*—Sections 4 and 8 of S. 2631 provide, with certain exceptions, that neither complainants, manufacturers nor product sellers may establish a fact in a product liability action by showing that the identical issue of fact was decided in a prior action. Thus, such parties may not ordinarily establish facts by means of collateral estoppel.

AIA strongly supports the prohibition of "offensive" collateral estoppel by complainants in product liability cases since: (a) it is inequitable on its merits; and (b) manufacturers and product sellers have been prevented by the nature of the doctrine from using "defensive" collateral estoppel in such actions. Offensive collateral estoppel permits complainants to avoid relitigation of a fact or issue decided in a prior case involving different parties.

The concept of collateral estoppel, as it has been applied in recent years, is particularly inequitable in that only complainants are permitted to make use of the doctrine. As currently applied, complainants may use offensive collateral estoppel, but manufacturers and product sellers are unable to use defensive collateral estoppel, i.e., they may not defend a product claim based upon a prior defense finding with respect to a specific fact or issue.

A manufacturer or product seller should not be denied its day in court and its opportunity to contest a complainant's allegations. Conversely, it is certainly not an unfair burden to require each complainant to prove its case against the manufacturer. Moreover, two considerations should be the goals of any product liability legislation—(1) the reduction of transaction and litigation costs, and (2) the encouragement of the prompt filing of claims. These goals will be severely undercut if the use of offensive collateral estoppel continues. If complainants can use collateral estoppel to make their cases, they will be hesitant to consolidate or settle cases and will be encouraged to delay prosecution of claims until a favorable verdict in a similar case is rendered against the manufacturer in another jurisdiction. The only equitable method of handling the concept of offensive collateral estoppel is to prohibit its use in product liability actions.

Therefore, AIA supports S. 2631's general prohibition of the use of collateral estoppel in product liability actions.

5. *Product Liability Legislation Should Establish a "Reckless Disregard" Test for the Award of Punitive Damages and Provide for Court Determination of the Amount of Such Damages.*—Section 13 of S. 2631 establishes a "reckless disregard" test for the award of punitive damages in product liability cases. It also provides that the determination of the amount of such damages should be made by the court and establishes criteria for that determination.

AIA strongly supports these provisions because they are likely to lead to more equitable and consistent decisions regarding punitive damages in product liability cases. The reservation of punitive damages to situations where a manufacturer shows "reckless disregard" for the safety of product users is the law in most jurisdictions. It would be consistent with a product liability system based on fault—rather than compensation—and a reasonableness standard for manufacturer responsibility. S. 2631's provision that the amount of punitive damages should be determined by judges in accord with uniform criteria—rather than by juries—should lead to awards that are more closely in line with such a system; it would also be consistent with the penal nature of such awards.

At present, punitive damages are not permitted in some jurisdictions and types of cases. While manufacturer exposure to punitive damages would therefore be increased by the enactment of S. 2631, we believe that a preemptive federal standard is necessary in order to produce more equitable and predictable decisions regarding punitive damages.

CONCLUSION

Manufacturing and distribution of consumer products increasingly serves a nationwide market. Preemptive federal legislation to establish uniform national standards is clearly needed to restore order to product liability law. We commend the Subcommittee for its efforts and urge it to report legislation which reflects the concerns we have expressed in this statement. Thank you.

STATEMENT OF JULIAN C. MORRIS, PRESIDENT, AUTOMOTIVE PARTS AND ACCESSORIES ASSOCIATION, INC.

The Automotive Parts and Accessories Association (APAA) is a trade association located in Washington, D.C., comprised of over 1400 manufacturers, independent manufacturers' representatives, distributors, and retailers of automotive parts and accessories sold primarily, but not exclusively, in the "aftermarket." The aftermarket supplies automotive products manufactured and sold independent of the original auto manufacturers.

The aftermarket is vital to this nation's economy, providing at least double the employment of the vehicle manufacturers and their dealers. We are hundreds of thousands of meduim and large, but mainly small manufacturers and others located in every state of the union producing and selling domestically in excess of $54 billion of parts, accessories and chemicals annually.

First of all, I would like to state our support for S. 2631 introduced by Senator Kasten as a sound and balanced solution to our product liability problems.

Mr. Chairman, members of our industry have been plagued by the high cost of product liability insurance since the early 70's when the definition of strict liability was expanded for product liability cases. The expanded concept seemingly imposed on manufacturers the sole responsibility for injuries casued by their products, often regardless of mitigating factors.

Liability can be imposed on the manufacturer even if the manufacturer uses good judgment and good materials in the manufacture of the product. The plaintiff only has to show that a product was the cause of an injury. He does not have to prove necessarily that the manufacturer was negligent in design or preparation. Currently the manufacturer is held liable if there is a design defect creating a concealed danger, misrepresentation of character or quality of the product from advertisements, failure to test and determine normal wear and tear, and failure to give adequate warnings or clear directions.

The duty to warn, often a critical factor in product liability cases, has been expanded to products which are manufactured properly, but which may become dangerous is misused. Manufacturers have been held liable for uses or modifications of their products for which the products were not intended, but which caused an injury. In 1977, the Texas Supreme Court ruled in favor of a plaintiff for injuries sustained in an accident when the butterfly valve of a defective truck carburetor locked in an open position. The driver had previously removed the original GM carburetor and made 11 changes to it (improper bolt, clamps, ect.) and then reinstalled it. The court ignored the jury findings that the reinstallation was a misuse which caused the accident and awarded the plaintiff $1.3 million.

The manufacturer has little control over how a product is used, and thus is put into the unfair and untenable position of having to fathom the unfathomable. This is caused in large part, by a tendency of the courts to designate the party who can most afford to pay, the liable party. In many cases, despite overwhelming evidence of improper use or negligence on the part of the user, the manufacturer gets saddled with the punishment because the court or jury felt that the manufacturer's assets are greater than the injured party. This economic theory of "justice" not only threatens the impartiality of justice, but also discourages responsible actions on the part of both product manufacturers and product users. Furthermore, the current economic climate and its effect on business calls into question this "deep pocket" theory. Many companies are in serious financial distress—a condition exacerbated by the added burden of unfounded liability suits.

The number of product liability suits have increased significantly over the past 10 years due to the expanded definition of strict liability and partially to the more informed consumer. The monetary amount has also increased forcing insurance companies to increase their premiums. This is most apparent in high risk industries. High risk industries are those which have been more susceptible to suits than other industries. Since insurance companies set rates based on aggregate rather than individual company risk, it is possible for a company to have no claims against them but be termed high risk because others in the industry have been hard hit by suits. As a consequence, the company then may not be able to obtain affordable insurance. It is the smaller manufacturing firms that can least afford to pay exorbitant premiums, least afford the capital drain of self-insurance, and least afford the risk of having no insurance at all.

Part of the problem for both manufacturers and insurance companies is caused by the myriad of differing state laws. Although some states have enacted product liability "reforms," the overall picture has changed little. Most manufacturers function in interstate commerce, just as insurance companies set their premiums from a national perspective. The nature of the distribution system in this industry often makes it impossible for manufacturers to know the destination of their product after it leaves the distributor.

The predictability of risk will be enhanced and the product liability problems of business will be mitigated only with reform on the federal level applicable to all states.

A federal uniform product liability law is needed to clear up the inconsistencies and correct the inefficiencies in the present tort system. The current confusion over product liability causes manufacturers to restrict innovation, and raise prices to cover escalating premiums set under uncertainty by insurance companies.

APAA has five key recommendations which we felt should be contained in federal uniform product liability legislation. I would like to explain the points and relate them to S. 2631.

1. *Elimination of manufacturer/seller liability if a product is defective only because the end user modified it, or put it to some use for which it was not intended.*—It is unfair that manufacturers of consumer goods should be required to become blanket insurers of the safety of their products when a product is put to uses not intended nor reasonably anticipated. Likewise, if a manufacturer of capital goods gives proper instructions on a machine's safe use when it is sold, the manufacturer should not be held liable if the machine is not properly used.

Section 10 of S. 2631 states that if misuse or alteration is caused by the claimant, the claimant's damages shall be apportioned to the extent that the misuse or alteration was a cause of the harm. We feel this adequately covers the problem.

2. *A statute of limitations which runs 7 years from the date of initial purchase for actual use or 10 years from the date of manufacture.*—Manufacturers and sellers of allegedly defective products often are confronted in states with no statute of limitations with being held liable for supposed defects which are not due to defective manufacturing, but rather to the length of time involved and ordinary wear through use. The buyer should be required to file suit within a certain amount of time except in expressed warranty situations and other cases where the effects, such as in the case of drugs, could take years to become apparent.

Section 12 of S. 2631 provides two alternatives to this problem, a 25 year cut off period for all suits involving capital goods or a 10 year rebuttable limitation on the life of the product from the sale. The latter would apply to all products. We think that 7 years from sale and 10 years from manufacture would be adequate since almost all true defects in automotive parts appear in the first few years of use.

3. *State of the art considerations making it impossible to apply present day standards to products built years ago in conformance with then existing standards.*—A part or machine built to the state of the art twenty years or thirty years ago should not be judged according to today's standards. A company which builds its reputation on machinery that "lasts" should not be penalized just because the state of the art had progressed.

We believe that this is covered by Section 5(b) which states that "a product is unreasonably dangerous in design if, at the time of manufacture of the product, a reasonably prudent manufacturer in the same or similar circumstances would not have used the design that the manufacturer used."

4. *A definition of a product as defective only when the defect made it unreasonably dangerous when manufactured or sold.*—This would prevent the courts from making manufacturers liable for the unreasonable use of a product. Currently, a plaintiff is required to establish that the condition of the defendent's product was defective and unreasonably dangerous, and that this condition proximately caused the plaintiff's injury. The term "unreasonably dangerous," however, admits a wide variety of in-

terpretations. The definition should be limited through some notion of ordinary and reasonable use, age of the product in question, and user modification.

Section 4(a) of S. 2631 defines unreasonably dangerous and provides specific conditions which must be established in order for a manufacturer to be held liable. These conditions would significantly clarify manufacturers responsibilities in product liability suits.

5. *Limitations on contingency fees for attorneys in product liability cases, and a call for reasonable awards with limitations on non-economic losses such as pain and suffering, loss of personal services, etc., and elimination of punitive damages.*—In most jurisdictions, there is no limitation on the amount of contingency fees received by attorneys in product liability cases. Many lawyers will take cases on a contingency basis and only charge the client a percentage if he wins. Coupled with the courts' inclination to favor the injured regardless of fact, this has caused an undue increase in the number of suits filed.

We understand that contingency fees give people who could not otherwise afford to sue, the opportunity to do so; however, we feel that some contingency fee limits would help to curtail the number of frivolous suits brought against manufacturers and help in doing so, to restore some reasonableness to product liability litigations. We also recommend a limit on so called "non-economic losses" such as pain and suffering. These are highly subjective judgements—juries understandably are swayed by a man in a wheel chair even though that man may be responsible for his own injury.

There is no limit on contingency fees in S. 2631. We recommend that a limit be added.

Punitive damages are limited in the bill to cases where there was a reckless disregard for the safety of the product user. We concur. The bill also sets specific guidelines on the setting of punitive damages when they are appropriate. APAA feels that these guidelines will help to limit punitive damages to deserving claimants and to reasonable amounts.

In addition to the five points above, we also feel that adherence to federal government standards should be included in the bill, as a rebuttable defense. This would help juries to judge whether a product was safely designed. It would also give manufacturers more direction in design to protect themselves from risk. Such a provision would have the added advantage of encouraging compliance with federal safety standards.

In conclusion, we commend Senator Kasten for his dedication to developing legislation which approaches a balance between both industry and consumer interests. The product liability problem can and should be resolved. We strongly recommend expeditious passage of S. 2631.

STATEMENT OF GARY C. ROBB

Mr. Chairman and Members of the Subcommittee, my name is Gary C. Robb and I am a practicing attorney in Kansas City, Missouri. I received my J.D. *cum laude* from the University of Michigan Law School and I hold a Masters degree in Economics from the University of Missouri. I formerly practiced with the Chicago law firm of Mayer, Brown & Platt.

I have been asked to testify with respect to my state of the art expertise. I am the author of "A Practical Approach to Use of State of the Art Evidence is Strict Products Liability Cases" published in the Northwestern University Law Review[1] and "Unraveling the State of Confusion in State of the Art Evidence" which was recently published in The National Law Journal.[2] The "state of the art" in product design refers to the level of scientific and technical knowledge pertinent to the product which existed at the time the product was designed and manufactured.

My comments herein are directed solely toward the definition and use of the phrase "practical technological feasibility" which constitutes a defense to a manufacturer's liability in the Product Liability Bill. The substance of this defense is one of the most important provisions of this uniform legislation.

These comments comprise my own thoughts and do not represent the opinions of clients for whom I may have participated in litigation. I do not represent any group or client with respect to passage of this proposed legislation.

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[1] Robb, "A Practical Approach to Use of State of the Art Evidence is Strict Products Liability Cases", 77 Northwestern University Law Review 1 (1982).

[2] Robb, "Unraveling the State of Confusion in State of the Art Evidence," 4 National Law Journal 36 (1982).

In my study of this Product Liability Bill, I have noted a major problem in connection with the definition and use of the phrase "practical technological feasibility." This phrase is defined in Sec. 2(8) as the "technical and scientific knowledge relating to the safety of a product which, at the time of manufacture of a product, was developed, available and capable of use or implementation in the manufacture of a product, and economically feasible for use by a manufacturer." The term is used in Sec. 5(b)(2) and 5(d)(2)(A).

In Sec. 5(b) the phrase is used to support a defense for a manufacturer's product design whereby "a product is not unreasonably dangerous in design unless" the manufacturer knew or should have known about the danger causing claimant's harm and "a means to eliminate the danger that caused the harm was within practical technological feasibility."

In the second instance the phrase arises in connection with proof of an alternative design. A product is not unreasonably dangerous in design unless the claimant shows that (1) the manufacturer knew or should have known of the alternative design; and (2) the alternative design would have (A) "utilized only science and technology for which there was sound scientific, technical, or medical support and which was within practical and technological feasibility."

"Practical technological feasibility" is a thoroughly confusing hybrid of economic *feasibility* and technological possibility. This confusion is prevalent in the case law and in many of the current state products liability statutes.[3]

The most disturbing aspect of the use of the phrase "practical technological feasibility" is that is combines a "technological impossibility" defense with a "feasibility" defense. A "feasibility" analysis applies a checklist of factors in order to determine whether the benefits of the challenged design on balance outweigh the risks of such design.[4] The "technological" aspect of the defense, however, requires an analysis as to whether the allegedly defective product conformed to the level of pertinent scientific and technological knowledge existing at the time the product was designed and manufactured. This "technological impossibility" concept is better known as the "state of the art" defense.

The "state of the art" means the level of scientific and technical knowledge pertinent to the product which existed at the time the product was designed and manufactured.[5] A number of courts have confused state of the art evidence with industry standards or custom,[6] governmental regulations[7] or a feasibility ananlysis.[8] The definition of "state of the art" as the level of pertinent scientific and technologic knowledge at a given point in time is in universal accord with the layperson's and engineer's usage of state of the art.[9] Thus, the unnecessary confusion in the law has arisen becasue of the courts' and legislatures' straying away from the simple, unambiguous lay and scientific definition of "state of the art".

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[3] *See, e.g., Larsen v. General Motors Corp.*, 391 F. 2d. 495, 503 (8th Cir. 1968); *Olson v. Arctic Enterprises*, 349 F. Supp. 761, 764 (D.N.D. 1972); ARIZ. REV. STAT. ANN. § 12-683 (Supp. 1980); NEB. REV. STAT.§ 25-21, 182 (Supp. 1979); IDAHO CODE § 6-1406 (1980).

[4] *Burns v. Riddell, Inc.*, 113 Ariz. 264, 267, 550 P.2d 1065, 1068 (1976); *Barker v. Lull Eng'r. Co.*, 20 Cal. 3d 413, 431, 573 P.2d 443, 455, 143 Cal. Rptr. 225, 237 (1978); *Wilson v. Piper Aircraft Corp.*, 282 Or. 661, 667, 577 P. 2d. 1322, 1325-26 (1978).

[5] *Bruce v. Martin-Marietta Corp.*, 544 F.2d 422, 477 (10th Cir. 1976); *Olson v. Artic Enterprises*, 349 F. Supp. 761, 765 (D.N.D. 1972); *Balido v. Improved Mach., Inc.*, 29 Cal. App. 3d 633, 640 105 Cal. Rptr. 390. 395 (1973); *Wiska v. St. Stanislaus Social Club, Inc.*, 390 N.E. 2d. 1133, 1138 n. 8 (Mass. App. 1979).

[6] *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 44 (Alaska 1979); *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871 887 (Alaska 1979). *But see Cantu v. John Deere Co.*, 24 Wash. App. 701, 704 603 P. 2d 839, 840 (1979) ("Plaintiff's brief refers to the 'state of the art,' which is sometimes confused with 'standards of the industry.' We believe the two phrases are not synonymous. . . .").

[7] *Frazier v. Kysor Ind.*, 607 P.2d 1296, 1301-02) Colo. App. 1979); *Rucker v. Norfolk & W. Ry*, 64 Ill. App. 3d 770, 381 N.E.2d 715 (1978), *rev'd on other grounds*, 77 Ill. 2d 434, 396 N.E.2d 534 (1979).

[8] *See* note 3 *supra*.

[9] Oxford American Dictionary 668 (1980), ("current state of development or knowledge of a subject"); the Randon House College Dictionary 1282 (Rev. ed. 1980) ("the scientific and technical level attained at a given time, as in the computer industry"); the Barnhart Dictionary of New English Since 1963, 442 (1973) ("the level of scientific of technological development in a given field or industry at the present, or at any designated, time"). Webster's New Collegiate Dictionary 1128 (1980) (the level of development as of a device, procedure, process, technique, or science) reached at any particular time usu. as a result of modern methods"); Webster's New World Dictionary of the American Language 1391 (3d College ed. 1980) ("the current level of sophistication of developing technology, as of computer science"); TIME, Sept. 28, 1981, at 24 ("it is imprudent to give *state-of-the-art* military technology to a regime . . . potentially vulnerable to overthrow") (emphasis added); Ziman, Science Journal, Sept. 1968, at 30 ("these brief reports of current research are presumably intended to give an accurate idea of the *'state of the art'* or of important 'breakthroughs' in particular fields") (emphasis added); N.Y. Times, Oct. 11, 1967, at 54 ("[t]hese positions provide unusual opportunities to engineers who want to put their own ideas into practice in the overall drive to increase the *state of the art*") (emphasis added).

The "state of the art" defense provides that proof of and conformity to the then-existing technological and scientific knowledge available at the time of the product's design and manufacture constitutes an affirmative defense to a manufacturer's product liability. The "feasibility" defense, on the other hand, requires an entirely different analysis, focusing on the elements of cost, marketability, ease of mass production, consumer appeal, likelihood of danger, and public expectation of danger.

The confluence of these distinct concepts results in the loss of many advantages. By severing the technological aspect from "practical feasibility", a finding that a manufacturer meets the "state of the art" is potentially dispositive. Such a finding would save substantial party and court resources from battling about the amorphous concept of design "feasibility."

The state of the art defense provides a definitive limit to a manufacturer's liability. A defendant manufacturer would know that as long as it is using the latest and, presumably, safest in design technology it could not be held liable in a product liability action. But if the manufacturer opted not to use the most advanced technology—that is, if its product's design failed to conform to the state of the art—its design would then be evaluated under the more uncertain legal standard of "feasibility" as applied by a future judge or jury. The manufacturer, in designing its products, could then balance the higher costs and lower liability risks of using the state of the art design against the lower costs of not incorporating state of the art design with the attendant increase in liability risk.

Separating state of the art from feasibility considerations is a "cleaner" approach. State of the art is an easier, more concrete standard than the mercurial test of feasibility and for that reason the state of the art standard is more susceptible to a disposition by way of summary judgment or directed verdict. It is a far more "self-contained" standard than the all-encompassing standard of "feasibility."

A feasibility analysis need only be undertaken *after* the fact-finder has determined that an alternative product design was within the then-existing "state of the art." This is because a particular design could not be "feasible" if it were simply not technologically possible when the product was made. Thus, feasibility analysis should not be concerned with the then-existing technology *per se*—that analysis concedes that more advanced technology existed—but with other factors which would reasonably justify the *non*-use of the higher technology.

The foregoing approach is simply a corollary of the universal rule, based on sound practical reasons, that a manufacturer is not required to incorporate the ultimate technology in safety or design.[10] The opposite rule would create economic and social havoc with the result that the vast majority of consumers would be priced out of the market for the bulk of consumer goods. Like other commodities, safety is a function of economic supply and demand, such that an artificially imposed safety device requirement would cost more than consumers are willing to pay.

Thus, the separation of the state of the art determination from the feasibility analysis recognizes that a category of products exists where the manufacturer's decision not to use available technology was reasonable. The advantages of my recommended approach stem largely from its clear emphasis on determining exactly under what circumstances a manufacturer is not required to adopt the technological state of the art.

The Bill should be re-drafted in the following manner to reflect these considerations:

Sec. 2. As used in this Act—

(8) *"State of the art" means the level of scientific and technical knowledge pertinent to a product's safety design which existed at the time the product was designed and manufactured;*

(8.1) *"Feasible" means that a product's design was economically and practically reasonable whereby the benefits of the design outweighed the risks of the design in light of: (1) cost to the consumer and manufacturer; (2) the tradeoff of competing safety considerations; (3) marketability, including the product's consumer appeal and ease of mass production; (4) the known danger of the product as designed; and (5) the social utility of the product;*

Sec. 5 . . .

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[10] *Weakley v. Fischbach & Moore, Inc.*, 515 F.2d 1260, 1267 (5th Cir. 1975) (no duty to design the safest possible product); *Marker v. Univerisal Oil Prods. Co.*, 250 F.2d 603, 605 (10th Cir. 1957); *Foster v. Marshall*, 341 So.2d 1354, 1361 (La. App. 1977); *Maxted v. Pacific Car & Foundry Co.*, 527 P.2d 832, 835 (Wyo. 1974) ("[t]here is no duty upon a manufacturer to adopt every possible new device which has been then conceived or invented").

(b) . . . A product is not unreasonably dangerous in design unless—

(1) . . .

(2) a means to eliminate the danger that caused the harm was within *the state of the art at the time the product was designed and manufactured; and*

(3) *Use of an alternative design was feasible for use by the manufacturer.*

(c) . . .

. . . (d) If an alternative design is offered as evidence that a product was unreasonably dangerous in design, a product is not unreasonably dangerous in design unless the claimant establishes that, at the time of the manufacture of the product—

(1) . . .

(2) the alternative design would have—

(A) utilized only science and technology for which there was sound scientific, technical, or medical support and which was within *the state of the art at the time the product was designed and manufactured;* . . .

(D) *been feasible for use by the manufacturer."*

This language would avert federal codification of existing confusion and inefficiency. The separation of state of the art from feasibility considerations would permit a more simplified fact-finding process and greater savings in judicial and party resources especially where the state of the art defense alone is dispositive.

STATEMENT OF JOHN W. WADE

My name is John W. Wade. I am presently Dean and Distinguished Professor of Law, Emeritus, at Vanderbilt Law School, Nashville, Tennessee. I have engaged in the teaching of tort law for over 40 years and am the senior editor of the leading casebook on the subject. I have held the position of Reporter for the Restatement (Second) of Torts for more than 10 years and have written extensively on the subject of products liability. I do not have—and do not expect to have—any economic interest in the positions of either manufacturers or consumers, or their attorneys. My sole interest in making the statement is a desire to play a responsible part in making the law of product liability in the United States as fair and equitable as possible to all parties.

Members of the legal profession who deal in the field of tort law are usually of the opinion that judicial development of the law is superior to legislative development. Standards developed by the courts are more conducive to particularized application to individual fact situations than more precise—and therefore somewhat more abitrary—rules, whether laid down by court or legislative body. The initial reaction of most members of the legal profession would therefore be that a statute—particularly a federal act—on the subject of products liability is not desirable.

But there are some unusual aspects of products-liability law that differentiate it from most tort situations. (1) The so-called product-liability crisis of the 70's produced a kind of panic that resulted in pressures on the state legislatures creating an over-reaction and the enactment in many states of "reform" acts that threw the common law sadly out of balance, largely against consumers. (2) Most manufacturers distribute their products through all parts of the country. If the law in the states differs materially, this may place a heavy burden on the manufacturers to make sure that their products meet the requirements of each state. (3) Liability insurance rates for manufacturers are not established individually for the separate states, and when one or two states render decisions increasing the likelihood or extent of recovery in a products case, rates may be raised for all states. Conversely, decisions or statutes in some states more strongly favoring the manufacturers will not have the effect of lowering the insurance rates in those states. The state statutes have therefore diminished the rights of consumers within the state without particularly aiding the local manufacturers.

If a fair and equitably balanced federal statute can be drafted and enacted, it may well have the effect of benefiting both manufacturers and consumers. The task is to prepare a draft that is expertly drawn and fairly balanced in its treatment of both plaintiffs and defendants. There are involved so many significant policy decisions and so many individualized factual variations that the common law is able to accomodate, but that a statute cannot attempt to provide for, that the task is exceedingly difficult.

The National Conference of Commissioners on Uniform State Laws (NCCUSL) was requested to undertake the task, but after giving careful consideration to the matter, it declined on the ground that because of the policy issues it would be unable to draft a statute that would be likely to be accepted by any substantial number of states.

Subsequently, a Federal Interagency Task Force Study was authorized and completed. As a result of the findings of that study, the United States Department of Commerce developed a Uniform Product Liability Act, 44 Fed. Reg. 62714 (1979). This pioneering undertaking produced an excellent beginning for a comprehensive statute on the subject, but it did not attain state adoptions or produce the desired stability in the law.

Pressure for a federal act has continued, and staffs for Consumer Subcommittees of the Commerce Committees of both Senate and House have been working on drafts, using the Department of Commerce Uniform Act as a beginning. These drafts have been subjected to criticisms and suggestions from organizations and individuals with expertise in the area.

As a result the drafts have steadily improved. The current draft, S. 2631, is the most satisfactory one yet to appear; and it leads me to believe that an appropriate balance can be attained and that a helpful and desirable federal act is within the realm of possibility.

I have studied this draft long and carefully and regret to say that I cannot endorse it in its present form as having fully obtained the right balance. I have, however, prepared a number of specific suggestions for modification, which I am submitting to the staff of the Senate Committee.

It is my sincere—and, I think, objective—belief that these suggestions will lead toward reaching the fair and balanced treatment of the subject that ought to be the objective of each member of Congress.

STATEMENT OF THE ALLIANCE OF METALWORKING INDUSTRIES

The Alliance of Metalworking Industries (AMI) is a coalition of six national trade associations. Each association represents a different segment of the contract metalworking industry.

Companies represented within AMI employ over 880,000 people in nearly 20,000 manufacturing plants. Combined sales exceed $34 billion annually.

Members of AMI include: American Metal Stamping Association, Forging Industry Association, Metal Treating Institute, National Screw Machine Products Association, National Tooling & Machining Association, and the Spring Manufacturers Institute.

The workplace product liability problem has its greatest impact on small businesses, including those in the metalworking industry. These companies have great difficulty following the development of the product liability law in each of the states where they ship products. Frequently, they are subcontractors and, hence, do not always know where, or for that matter in which end product their component parts are used.

Small businesses are the least able to afford the massive increases in product liability insurance premiums experienced by American businesses in the recent past when court decisions in some states led to increased insurance costs throughout the country. At the same time, small businesses, if uninsured or under insured, are also least able to bear the burden of heavy product liability losses.

The current situation of laws being unevenly developed and interpreted by legislatures and courts in 50 jurisdictions has led to uncertainty and unpredictability. In some states, liability has been expanded beyond a fault-based tort system and towards the imposition of a compensation-based tort system of absolute liability for product-related design decisions. This has resulted in inordinately high costs for small businesses, not the least of which are an avoidance of innovation and an inhibition to competitiveness.

The member companies of AMI support S. 2631, the Product Liability Act, because they believe it is a balanced bill that will create a set of product liability litigation rules that everyone would be able to understand: product sellers, consumers, labor unions, employers, lawyers, and judges. The uniformity provided by a federal tort statute would bring predictability to insurance rate-making thus stabilizing, if not reducing, product liability insurance premiums for most small businesses.

AMI was particularly pleased to see that the legislation reaffirms the workers' compensation bar against employees recovering from their employer. This bar has been slowly whittled away in the past few years. While the prohibition of subrogation rights will undoubtedly increase workers' compensation insurance costs, business faces a potentially disastrous situation if the bar against employees suing their employers is not maintained. This agreement, which has its roots in the original workers' compensation statutes of virtually every state, dates back to the early 1900's.

Member companies of AMI manufacture everything from large special machines to small springs. They feel that the statute of repose in the legislation should apply to all products and not just capital goods. This is because any product can be the cause of a product liability action. The statute should also be applicable to all actions and not just cases involving design liability or failure to warn liability.

A statute of repose is especially important to AMI member companies that do manufacture capital goods. Currently, companies are defending products that are over 40 years old, which have been altered, misused, and not properly maintained. Sometimes the products have changed owners several times, or were manufactured by another company that the manufacturer purchased years before. Knowing that cases are being tried involving such circumstances prevents a company from planning its affairs with any certainty.

A ten-year statute of repose, with an exception made for cases involving fraud, would be fair. Rarely does a product that has been properly used and maintained cause an injury due to the failure of a manufacturer to fulfill his original rsponsibilities when the product has already been functioning well for such a long period of time. If there are to be additional exemptions, then a longer statute of repose in those cases could be offered.

Approximately 5% of the AMI membership is involved in government contracting. Though this figure is small, it is growing. Studies have shown that an increase in the number of small companies manufacturing products for the government would result in substantial cost savings for the government. Small companies can generally produce for less due to their lower overhead and costs. In addition, opening these contracts up to small businesses would mean more of them could obtain their own contracts directly from the government, thus reducing the added costs involved when contracts go to large corporations that, in turn, subcontract the work out to our members.

For these reasons, it is very important that the legislation include a presumption that a product manufactured to the specifications of a government contract is not unreasonably unsafe in any way. A federal contract is quite specific in terms of its required design and construction. The process involved in developing a product for government use is such that any duty to warn is certainly detected prior to the contract bring let. To hold a business liable is to place upon it an unfair burden because the manufacturer is not free to amend the design or alter the construction as he is when manufacturing a product of his own creation. If the product does not meet the contract's specifications, he is not in compliance and is liable. Conversely, manufacturing to the government's specifications should remove his liability.

As frequent subcontractors to larger companies who is turn product goods for both the private and government sectors, our members also feel that the legislation should specify that the entity responsible for a product's design and the construction decisions should be liable for any harm caused by that product. As with govenment contracts, the subcontractor is usually not in a position to alter any aspect of a component that he feels may be unreasonably unsafe. Frequently, he is not even in a position to know the final use to which his product will be put and subsequently may be unable to detect its unsafe aspects. Though usually such claims are dismissed, specific liability in these situations would help reduce the number of times they are brought into a case in the first place.

The members of AMI would like to thank Senator Kasten for his leadership in attempting to solve the growing product liability problem. We stand ready to be of assistance in any way.

STATEMENT OF T. RICHARD BROWN, CHAIRMAN, NATIONAL ASSOCIATION OF MANUFACTURERS PRODUCT LIABILITY AND EMPLOYEE COMPENSATION SYSTEMS COMMITTEE TASK FORCE ON INDEMNIFICATION OF GOVERNMENT CONTRACTORS

I appreciate the opportunity to submit this written statement regarding S. 2631, the Federal Product Liability Act, on behalf of the NAM Task Force on Indemnification of Government Contractors. NAM supports the effort to provide clear and reasonable rules applicable in all product liability cases. NAM is concerned, however, that the bill does not address an important issue in product liability facing those who contract with the Federal government—the effect of compliance with Federal government contract specifications on cases which involve an allegation of a design or warning defect.

NAM believes a Federal product liability act should provide that, except in specific situations, a manufacturer which sells a product to the Federal government is not responsible for harms caused by defects in design or warnings, if the product conforms to Federal contract specifications. Such a provision, often referred to as the government contractor defense, is fair and has been recognized in case law. Discussed below are (1) the rationale for the provision, (2) the case law on the issue, (3) exceptions to the rule, and (4) the effect of the rule.

RATIONALE FOR THE GOVERNMENT CONTRACTOR DEFENSE

The rationale for the government contractor defense is based on the traditional standard of reasonableness applied in product design or warning cases. S. 2631 comports with traditional law and provides in Sections 5(b) and (6) that a manufacturer is responsible for an unreasonably unsafe design or warning only if it acted unreasonably in using the design or warning which caused the claimant's harm. The basic issue is what a reasonable manufacturer would have done with respect to product design or warning.

In a government contract situation, a manufacturer which makes a product in accordance with Federal contract specifications has acted as a reasonable manufacturer and should not be subjected to liability for a design or warning defect. Such a defense to liability in design and warning cases reflects the realities of the Federal government contract system.

First, Federal government contract specifications are generally developed by and under the control of the government. Generally, the manufacturer has little or no control over product specifications issued with the contract. Second, the manufacturer must strictly comply with contract specifications, because failure to do so violates the contract. The contracting manufacturer must assume that compliance with specifications issued by the Federal government will result in the manufacture of the product desired by the government.

NAM believes that the manufacturer is also entitled to assume that compliance with the specifications will result in a reasonably safe product. Where the manufacturer has no control over the specifications but must nevertheless conform strictly to those specifications, it is unfair to hold it responsible for resulting design and warning defects. Those defects inherent in and required by the contract specifications should be the responsibility of the party which drafted the specifications—the Federal government.

Given the realities of the Federal contract system under which a reasonable manufacturer strictly complies with contract specifications issued by the Federal government, a contracting manufacturer should not, except in those circumstances identified below, be held to have acted unreasonably in designing or warning about a product which is in compliance with Federal specifications. It should have a complete defense to liability in such situations.

CASE LAW SUPPORT FOR THE GOVERNMENT CONTRACTOR DEFENSE

Courts have recognized the government contractor defense in negligence actions against government contractors since the early 1900s. *E.g., Yearsly v. W. A. Constr. Co.,* 309 U.S. 18 (1940); *Littlehale v. E. I. duPont de Nemours Co.,* 268 F. Supp. 791, 802-04 (S.D.N.Y. 1966); *Sanner v. Ford,* 154 N.J. Super. 407, 381 A.2d 806 (1976); *Ryan v. Feeney—Sheehan Bldg. Co.,* 239 N.Y. 43, 145 N.E. 1321 (1924).

In strict liability claims against the contractor, courts are split on whether the government contractor defense applies. *Compare Challoner v. Day & Zimmermann, Inc.,* 512 F. 2d 77 (5th Cir. 1975) *with Hunt v. Blasius, 55 Ill. App. 3d 14, 370 N.E.2d 617 (1977), aff'd,* 74 Ill. 2d 203, 384 N.E.2d 368 (1978). This split of authority would be resolved under S. 2631 if the government contractor defense were included, because the defense would only be applicable in design and warning cases which are, under S. 2631, negligence or fault-based claims rather than strict liability claims.

One very recent case recognized the existence of the government contractor defense and set forth the elements of that defense. *In re "Agent Orange" Product Liability Litigation,* MDL No. 381 (E.D.N.Y. February 24, 1982). According to that court, the defense exists if the government established the specifications for the product, the product was manufactured according to the specifications, and the government actually knew as much or more than the defendant about hazards associated with the product.

EXCEPTIONS TO THE GOVERNMENT CONTRACTOR DEFENSE

Where there is proof that the contracting manufacturer actually developed the specifications incorporated into the government contract, the defense should not be available. This situation may arise where the specifications request a product which is identical to a commercially available product or where the contractor actually drafts specifications which are incorporated without change by the government into the contract. Similarly, NAM believes that the defense should not be available in cases where the contractor has actual knowledge of hazards created by government-drafted specifications and fails to bring that knowledge to the attention of the government.

Where the manufacturer fails to comply with the specifications and, therefore, mismanufactures the requested product, it will be strictly liable for harms resulting from the error in construction, as required under Section 5(a) of S. 2631. This is not an exception to the government contract defense, but rather a situation where the defense does not apply at all.

EFFECT OF THE GOVERNMENT CONTRACTOR DEFENSE

The defense for compliance with government specifications is in accord with sound case law and will clarify any confusion which currently exists about the availability of the defense. Therefore, it will reduce transaction and litigation costs, a goal of a Federal product liability bill.

The defense is fair to manufacturers who do business with the Federal government and who must strictly comply with the government's specifications. It is fair to claimants. Non-government employees would have a right of action against the party actually responsible for the design or warning defect which caused their harm. Civilian government employees would be compensated under the Federal Employees Compensation Act. 5 U.S.C. § 8107. Military government employees would be compensated under the Veterans' Benefits Act. 38 U.S.C. § 101.

Finally, the defense would promote safety in the design and warning of products purchased by the government. It would place the costs of defects on the party responsible for the defects and best able to avoid the defects.

STATEMENT OF THE CYLINDER MANUFACTURERS ASSOCIATION

On behalf of the Cylinder Manufacturers Association ("CMA"), a non-profit trade association representing companies that manufacture compressed gas cylinders and their component parts (see Attachment I), we strongly supported S. 2631, the Product Liability Act of 1982 ("Act"). CMA believes that the legislation will make needed improvements in substantive product liability law that are of concern to cylinder manufacturers as well as other manufacturers and product sellers.

S. 2631 has abeen introduced at a propitious time because the serious product liability problems faced by industry are being aggravated by inconsistent application of state laws and common law doctrines that yield widely disparate results in similar litigation matters. CMA believes federal legislation is necessary to remedy the problems in the complicated and ambiguous product liability field. It is our view that S. 2631, while not resolving every issue, would bring about more equitable results in product liability actions by imposing liability only where it can be shown that responsibility exists for the injury.

In particular, CMA would like to express its strong support for the following provisions: sections 5 and 6 which provide for a "reasonably prudent manufacturer" test with respect to product design and construction, and product warnings or instructions; section 6 which does not hold a manufacturer liable for failure to warn about obvious dangers or consequences of misuse, alteration or modification; section 9 concerning comparative responsibility which reduces damages by an amount proportionate to the claimant's responsibility; section 10 which apportions damages to the extent that a misuse or alteration caused the harm; and seaction 14 which deems evidence of corrective measures taken by a product seller to be inadmissible in court to prove liability.

However, CMA believes that there are certain critical issues which are not addressed in the most recent version of this bill. More specifically, CMA is vitally interested in the establishment of a reasonable time limitation on the liability of product manufacturers and sellers. Thus, CMA regards an acceptable "statute of repose" provision as assential. Further, CMA favors provisions under S. 2631 that would create federal preemption of state product liability law. In addition, we strongly urge that S. 2631 include provisions that address a manufacturer's compliance with government specifications and plaintiff's burden of proof of manufacture, which were deleted from earlier staff drafts of this legislation.

I. TIME LIMITATION ON LIABILITY

The most significant aspect of substantive product liability reform legislation to CMA members is the establishment of a specified time period after which the manufacturer of a product will not be held liable for certain consequences. For makers of extremely durable goods, such as cylinders, this prospect overrides all other considerations regarding product liability reform legislation. It is, simply, not possible to accurately track and monitor goods which remain in the market place as long as 40 years after their initial manufacture. This is the case with many larger capital goods but also extends to such smaller, more portable products as compressed gas cylinders.

The notion of a "statute of repose," a specified period of time after which a manufacturer is relieved of product liability, is a controversial and contentious one. CMA supported the provision in Staff Draft No. 1 that provided a statute of repose period (i.e., 10, 20 or 30 years) based on the type of goods (i.e., major appliance, capital goods, other). Staff Draft No. 2 adopted a simplified approach by providing a single statute of repose of 25 years for capital goods. Although CMA endorses the approach, it cannot agree with the extended time period. Twenty-five years is an unreasonably lengthy period of time to hold a manufacturer liable for goods that have entered the stream of commerce.

CMA asserts that S. 2631 provides the opportunity to enact a simple, readily understood statute of repose. Moreover, CMA submits that it is a concept key to the reformation of our patchwork state product liability laws. For this reason, we urge that a 15-year statute of repose be applied to all products in the marketplace. If CMA's recommendation is not adopted, we will support the alternative proposal under section 12 of the Act which creates a rebuttable presumption that after a 10-year period "the harm of a claimant was not caused because the product was unreasonably dangerous because of its design, or unreasonably dangerous because of the failure to provide adequate warning or instructions. . . ." Although CMA does not prefer this statutory alternative to its suggestion of a mandatory 15-year statute of repose, it would support the "rebutable presumption" provision as an improvement to the existing state of the law.

Finally, the statute of repose provided under the final version of S. 2631 should not be riddled with exceptions as is the provision contained in the current proposal. One of the rationales for federal intervention in the product liability field is to provide uniformity in such litigation. Any exceptions, such as the provision concerning the cumulative effects of products, can only serve to subvert the interest of uniformity and certainty in product liability litigation. The statute of repose should apply to all products in all product liability actions, except for those cases where fraud or misrepresentation on the part of the manufacturer can be adequately proven. Only under such a system will greater predictability accure to the product liability area. And only with such predictability can we ensure the introduction into the marketplace of innovative and progressive product ideas that serve well our economy and society.

II. FEDERAL PREEMPTION

CMA agrees with the drafters of S. 2631 that there is a need to preempt state product liability laws. Manufacturers and other product sellers need uniform and fair product liability standards on which to make projections of their responsibilities and liabilities. Consumers also will benefit from the establishment of product liability guidelines which provide some basis for judging their likelihood of success in litigation and estimating potential damages.

Thousands of businesses cannot afford the cost of analyzing and complying with state-by-state product liability laws. Unfortunately, despite substantive tort law reform projects such as the Model Uniform Product Liability Act, state laws remain widely disparate. In fact, over the last six years, of the 22 states that have enacted some form of product liability legislation, no two have enacted identical statutes. Some statutes include statutes of repose and other do not; some provide termination of liability after a specified number of years and others provide only for a presumption of no responsibility; some provide as a defense to liability the modification or misuse of a product by the consumer, while others do not; and some state statutes permit evidence of post-manufacture improvements in a product to be introduced to prove defective design and some do not allow introduction of such evidence under any circumstances. In sum, while the model product liability act served as the starting point, by the time each state had enacted its own product liability statute, there were 22 distinct versions with which manufacturers and product sellers had to cope.

Federal preemption of state law regarding product liability matters governed by S. 2631 will result in a clearer understanding by manufacturers and product sellers of their responsibility and liabilities for the products they introduce into the marketplace. We believe this will occur in such a manner so as not to deter manufacturers from developing new and innovative goods. In addition, litigation costs will be reduced by decreasing the number of issues that need to be litigated (including the conflict of laws issue) through easier resolution of the principles of law to be applied, and by deterring frivolous litigation that is brought only in the hope of garnering a pre-trial settlement.

Further, as a derivative benefit of increased certainty in product liability matters, it is likely that insurance rates for product liability coverage will stabilize, thus allowing businesses to more accurately project costs and to avoid a continuing escalation of these costs which must necessarily increase the price of their goods to the consumer. Finally, it is important to note that these goals can be achieved with minimal federal intervention into this area. No federal bureaucracy is created. No administrative structures of any type are required under S. 2631, and importantly, no expenditures of scarce fiscal resources would be necessitated by enactment of S. 2631.

III. COMPLIANCE WITH GOVERNMENT STANDARDS

Compressed gas cylinder manufacturers are subject to strict and comprehensive regulation by the Department of Transportation ("DOT"). Because of this, CMA believes that, as provided in Staff Drafts Nos. 1 and 2, compliance by product manufacturers with government standards are relevant and appropriate for consideration by the trier of fact. Government standards are neither frivolously imposed nor casually complied with by those subject to such regulations. We think it is entirely appropriate that compliance with those standards or specifications be weighed in the favor of the complying manufacturer or product seller.

Product liability litigation is complex enough without introducing into the decision making process the wholesale reevaluation of the effectiveness of government regulations, particularly because such specifications are not set by manufacturers but rather imposed upon them. In most cases a manufacturer cannot circumvent compliance with governmental regulations if it wishes to market its product. To hold the manufacturer liable *post facto*, despite its compliance with such specifications, is inequitable. Compliance with federal government regulations should be considered relevant in the determination of liability by the trier of fact.

IV. PROOF OF MANUFACTURE

As a general concept, CMA believes that the burden of proof placed on claimants under the Act should include proof, by the appropriate standard, of the manufacturer of the product alleged to have caused the harm to the claimant. Although Staff Drafts Nos. 1 and 2 addressed what has come to be referred to as the *Sindell* decision,[1] S. 2631 has now reversed those earlier drafts and contains language accommodating that decision. Under *Sindell*, the plaintiff was not required to prove specifically who manufactured the product alleged to have caused the harm, but only to have brought the action against manufacturers of the product that represented a substantial share of the relevant product market.

We believe the *Sindell* decision advances an inequitable and inappropriate rule, placing undue burden on innocent manufacturers within any specific industry, and that adoption of the rule will cause mambers of some industries to suffer disproportionately as compared to other industries. Further, the adoption of the *Sindell* decision introduces increased unpredictability and ambiguity into the federal product liability arena, in contrast to the thrust of S. 2631, which is to reduce such uncertainty. CMA fully supports a central objective of S. 2631, which is to ensure that manufacturers are fully responsible for the products they produce and introduce into the marketplace and, further, that they be held liable for any adverse consequences that ensue from such products. We do not, however, believe that, on an industry by industry basis, manufacturers should be held accountable for the liabilities of others. We believe that to establish liability as to any manufacturer, the plaintiff simply must be required to prove that the manufacturer in fact made the product at issue. The Cylinder Manufacturers Association strongly supports the Product Liability Act of 1982. S. 2631 strikes an appropriate balance between the need for federal guidelines concerning product liability litigation and the unnecessary and unwanted intervention of a federal bureaucracy and attendant regulations in the area. Although CMA has some reservations regarding specified provisions of the bill, as outlined above, the association and its members are firmly committed to supporting passage of S. 2631. This bill represents the fairest and most well-reasoned approach to date to resolving the myriad problems that vague and inconsistent state product liability laws present to product manufacturers and sellers. S. 2631 represents an important step in bringing about the equitable treatment of the rights and obligations of both product sellers and consumers of those products. CMA will devote its best efforts and resources to insure the enactment of S. 2631 during this Congress.

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[1] *Sindell* v. *Abbott Laboratories*, 607 P.2d 924, cert. denied, 449 U.S. 912 (1980).

STATEMENT OF NANCY ADESS, PRESIDENT, DES ACTION, NATIONAL

Senate Bill 2631 is an attempt to establish a uniform product liability law for the entire country. A product liability law is one that determines under what conditions a consumer of a product can hold a manufacturer or seller of that product liable for in jury, harm, or damages resulting from use of the product. Such a law should establish protection for consumers of products that would motivate the producers and sellers of those products to manufacture them in such a way as to insure that they are not harmful in design, manufacture, or use.

The product liability bill before us does not afford these protections to the consumer. Rather than making recourse to litigation in the case of defective or harmful products more available to the consumer, S 2631 places obstacles in the path of consumers who seek to protect their interests through litigation.

We will address here those aspects of S 2631 which would most seriously impede consumers of DES and their offspring from seeking retribution for harm or damages.

Section 3(c). This section provides that this bill would supercede all existing state law despite the fact that several states, California among them, are operating under legal precedents that are more favorable to the consumer than S 2631.

Section 3(d). S 2631 would make it mandatory that all actions of product liability be heard in state courts, despite the fact that district courts are the traditional site of cases involving inter-state parties. Because state courts are subject to the political influences in the locale in which they are situated, DES Action feels that federal courts, which have lifetime appointments, provide a measure of impartiality, perspective, and the opportunity for substantial justice that would be lost by divesting district courts of product liability actions.

Section 4(b). This section reads, in part, "Expert opinion is not considered sufficient evidence to support a proposition of fact unless it is supported or coroborated by sound objective evidence," in relation to determining manufacturer liability.

The phrase "sound objective evidence" remains undefined, and presumably it could be used to undermine other evidence or testimony. For example, it appears that expert testimony by a medical specialist in teratology, oncology, pharmacology, or other specialties, based on extensive study of medical reports would not be sufficent to prove manufacturer liability. However, given the nature of medical cases, where expert testimony is required in part because there is no single opinion or single objective criterion, eliminating such opinion as basis of proof in effect eliminates much of the evidence a plaintiff can bring to bear on her/his case. What "sound objective evidence" could be used to prove these points?

Section 4 (c). This section creates the illusion of enabling DES exposed individuals who have suffered harm to bring suit even in the absence of being able to meet the requirements of Section 4(a)(2), i.e., to name the manufacturer of the product claimed to have caused the harm.

However, in fact, this section places insurmountable obstacles in the way of anyone without such positive manufacturer identification.

First, the burden on the plaintiff in meeting the requirements of this section is to produce "by clear and convincing evidence" the contingencies required, i.e. that every reasonable effort to establish the identity of the manufacturer has been made, that all manufacturers are named as defendants, and that they are in a better position than the plaintiff to know if they might be the actual defendant. The "clear and convincing evidence" requirement is a greater burden than the traditional "preponderance of evidence" rule, as the bill itself states in Section 2.2. "Clear and convincing evidence" has been defined as something that is greater than the civil standard of preponderance of evidence and something less than the criminal standard of "beyond a reasonable doubt" and "to a moral certainty", something that is generally unheard of in civil litigation.

Furthermore, the facts required to be proven by "clear and convincing evidence" must be proven to the court, not to a jury or other trier of fact. Thus, in a preliminary hearing even before the litigation commences, the claimant's success in satisfying the restrictions of this section is at the discretion of the court.

The following must be proven by "clear and convincing evidence":

First, the claimant must make "every reasonable effort" to identify the manufacturer. What constitutes "every reasonable effort"? Is it enough to attempt to contact the mother's obstetrician, the hospital of birth, and/or the pharmacist where she bought the medication? Or must one seek to find sales records of each of the 354 manufacturers and/or sellers of DES-type drugs to establish whether they might have supplied the pharmacy in question? Clearly, "every reasonable effort" leaves substantial leeway and discretion to an individual judge to determine whether this test has been met.

Second, the claimant must bring the action against "every manufacturer which could have produced, made, or constructed the product unit which allegedly caused the harm complained of". This is an impossible requirement. For example, there were 354 known manufacturers of DES during the peak years of its use. To bring action against every one of them, rather than, as the California Supreme Court decided in Sindell, against those participating in a substantial share of the market at that place and time, is clearly impossible. Just to serve process on each manufacturer would place a prohibitive expense on even the most financially capable plaintiff's attorney (estimated at a cost of $7,500), and would preclude any firm from taking such cases, leaving potential plaintiffs without access to attorneys and therefore without access to the courts.

Third, the plantiff must prove by "clear and convincing evidence" that each of the manufacturers is in a better position than the claimant "to establish which manufacturer actually produced" the product involved. It is clearly an impossible task to prove the capability of any, let alone each, of 354 manufacturers as to their level of knowledge or information about the manufacture and distribution of these drugs. The cost of discovery necessary to undertake even a preliminary survey would be impossible for any law firm to meet. Each and every manufacturer may not have superior knowledge than the plaintiff concerning all the other defendants. Thus, if it is demonstrated that 5 percent, 10 percent, or 15 percent of these firms do not have superior knowledge, does than mean that plaintiff cannot proceed because this plaintiff has not met the requirements of this section?

Section 4(d). Even were a plaintiff by some Herculean feat to establish all the facts required in Section 4(c), no other plaintiff could then benefit from the extensive work that would have been done, according to this section. Each plaintiff must re-prove all of the facts already learned in another case. This constitutionally deprives the court of the ability to give "full faith and credit" to the judgement of sister states and, in California, it would deprive the court from taking judicial notice of the courts in other states. Furthermore, there is no sound reason for reinventing the wheel in this way other than to make it more difficult for a consumer to obtain the justice to which she/he is entitled. These requirements would add years to each case long before it could even approach a trial stage, discouraging plaintiffs and attorneys alike from pursuing litigation. This seems to be the intent of this section of this legislation.

Section 5. This section eliminates the Doctrine of Strict Liability in product liability law as it is known throughout almost all the 50 states.

The Doctrine of Strict Liability holds that the plaintiff need only demonstrate the existence of a defect in a product, and that the defect was a proximate cause of the injuries. (*Barker* v. *Lull Engineering Co.* 20 C3d, 413, 143 C.R. 225(1978)).

This section states that, besides defect in construction, to prove defect of design one must establish negligence as well. Thus the manufacturer would have to have known about the danger of the product and been unable to improve upon the product without impairing its effectiveness. The practical effect of this is that, even though the manufacturers had known that DES was a carcinogen (a substance known to produce cancer in human beings), because the carcinogenic property could not be removed from the presumed efficacy of the drug, the manufacturer would not have been required to alter the product, but only to warn of this known carcinogenic effect.

Other sections of this bill are equally offensive to consumers for the reasons we have discussed. We will focus, however, on only one other section.

Section 12d. This section places a two year limitation on the time a claimant may file suit after discovering harm. However, many people exposed to DES discover harm at one time and the cause of the harm at another. For example, a DES daughter who miscarried a pregnancy in 1977 due to deformity in her reproductive organs, could not have known that such deformity was caused by her DES exposure before the medical literature revealed this connection in 1980. Even then, she or her doctor might remain unaware of this fact until a news article or other source brought it to their attention some time later. However, under this section, 1979 would have been the latest time that this plaintiff could have brought action, being two years after her discovery of the harm, i.e., the deformed organ.

These are the major portions of S. 2631 that are of concern to DES Action, and likely to other consumer interests as well. Other sections of the bill also have clauses that concern us. Nevertheless, suffice it to say that the entire tenor of this piece of legislation seems to us to protect the manufacturer of harmful products from every being brought into court and held responsible for their products.

Both the Doctrine of Strict Liability, practiced throughout the country since 1960, and the *Sindell* decision in California in 1980, are abandoned in this legislation in favor of greater protection to the manufacturers from harmed consumers.

DES Action feels strongly that no uniform product liability legislation at this time would serve the interests of consumers throughout the country, and that product liability law should continue to be fashioned at the state level.

AMERICAN INSURANCE ASSOCIATION,
New York, N.Y., March 22, 1982.

Senator ROBERT W. KASTEN, Jr.,
Senate Consumer Subcommittee,
Russell Senate Office Building, Washington, D.C.

DEAR SENATOR KASTEN: The American Insurance Association is a trade association composed of 150 publicly owned property-casualty insurers. Our membership provides the majority of product liability insurance written by commercial insurers in the United States.

The American Insurance Association has already indicated its support for Federal product liability tort legislation. We continue to believe that such legislation is necessary and that its enactment at a Federal level is appropriate. We have in the past supported state level legislation but it is apparent that product liability tort law has special characteristics which warrant Federal action.

In our study of product liability, we have been fortunate to have Professor Richard A. Epstein of the University of Chicago Law School as our consultant. Attached to this letter is a brief paper he has prepared on this issue. We ask that this letter, with Professor Epstein's piece, be included in the record of the hearings of your Senate Consumer Subcommittee concerning product liability.

Very truly yours,

DENNIS R. CONNOLLY,
Senior Counsel.

Enclosure.

WHY LEGISLATION?*

1. WHY LEGISLATION?

The reasons for legislation—indeed federal legislation—on the full range of products issues are many and complex. No single consideration is decisive, but a large set of considerations all point in the same direction: some corrective legislation is now urgently needed. The current common law rules of products liability are productive of enormous mischief. The courts which have been responsible for the creation of much of the difficulty have in some instances no power to set the matter aright, and in others no inclination. To be sure, the current system of liability rules rests upon the most laudable of intentions. It seeks to promote product safety, to facilitate sound product design, to instruct consumers on proper product use, and to warn them of attendant dangers. It wishes to make whole persons injured by product defective products, to the extent that money can do this. And it wants to do all this at low administrative cost. If lofty intentions alone mattered, products liability law would count as a magnificient success. But it is results that matter. By that test the modern common law rules are an abject failure. They create a pattern of rights and duties that no other industrial nation has seen fit to imitate, and for good reason.

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*Statement on behalf of the Amercian Insurance Association prepared by Richard A. Epstein, March 11, 1982.

The legal system today is characterized by enormous costs, confusion and uncertainty. Amid the welter of cases, no one today can give a coherent count of the central term "product defect"on which the outcome of thousands in cases turn. The failure of definition is not an idle concern. It makes it impossible for any manufacturer who wants to stay in business to make products that he knows will satisfy the law's demands. The same failure of definition drives litigation costs private and social, to enormous levels. Juries are called upon to make delicate judgments about product design and technical feasibility that tax their competence to the breaking point, as expert witnesses are locked in hopeless conflicts that no Solomon could hope to resolve. Cases for which conpensatory damages would have been unthinkable a generation ago are today transformed into punitive damage actions, as every conscious judgment can be made to have quasi-criminal overtones. The system of workers' compensation, once regarded as a major social institution, has become outflanked by tort actions, and is in major danger today.

The costs of these errors work against the original goals of the system, often in unintended ways. The increased liabilities imposed upon manufacturers increase the costs of the goods that they sell. Demand for the goods falls, as customers seek out other alternatives that promise them a lower price. One possible move is to defer the purchase of new equipment to replace worn out products. Another is the adoption of certain risky procedures that could be avoided if newer equipment were purchased. The number of products liability suits may go down because of the private response to the legal command, but the number of accidents could well increase, as the judicial demand for safety channels private resources into unproductive use. Possibilities like this are inherent in the nature of judicial legislation, yet it is difficult to find a single judicial opinion which asks the question of how the modern rules in fact accomplish their stated ends. There is no theoretical explanation, let alone statement of empirical assumptions, as to why or how the more stringent rules will reduce the level of accidents. Nor does any empirical study suggest that any reduction—let alone reduction worth its cost—has taken place, now that these rules are in place. The current situation, then, is not the result of some well considered plan of attack, let alone one that justifies the enormous changes that have been wrought. No legislative deference is owed to any supposed judicial expertise in the area.

In thinking about legislative reform of products liability law, another common misimpression must be dispelled. Legislation on tort issues has long been regarded as proper and appropriate. Thus both the nineteenth and twentieth century legislatures have passed specific safety statutes for railroads, mines, factories and the like. The question, do these statutes create a private cause of action, at bottom raises an issue of legislative intention. How then can it be improper, or even unwise, for a legislative to clarify the role that its administrative standards have in private litigation? Take another case. Statutes of limitations are, after all, statutes indispensable for the operation of the tort system. Yet what court to by can by judicial decision make a rule which says one year for battery and two years for negligence. An outside statute of limitation in products cases in designed to serve many of the same ends of an ordinary statute of limitations. A well-considered statute could bar stale claims, where evidence is difficult to acquire, and the reliability of case by case adjudication suspect. An outside statute of response may, if drafted with suitable exceptions, promote safety by creating the proper incentives upon the parties in possession of a product. The arguments on the issue are difficult and delicate. The enterprise may not in the end by worth taking. But the subject is ripe for legislative consideration. Yet there is no way a court could develop such a statute, with its requirement for fixed and clear time periods.

Two more examples are useful. In many jurisdictions comparative negligence has become the rule. While some states introduced it by judicial decision, no one ever thought this fundamental reform of a common law rule was an inappropriate subject for legislation, of which an early and notable example was the Federal Employer's Liability Act (FELA), 45 U.S.C. § 53 (1926). The same is true with legislative specification of the rules of contribution and indemity.

Questions of tort reform by legislation have not been confined to interstitial matters. The FELA reshaped the common law of negligence for the industries it covers. Workers' compensation, generally hailed as an important advance that at both the state and federal level, has gone even further and has displaced the unwieldly body of common law rules on employer's negligence, common employment, assumption of risk, and contributory negligence. It must therefore be a fit subject of legislation to coordinate the compensation remedy with, first, the worker's products liability actions against third parties, and, second, the actions brought by third parties against employers covered by workers' compensation.

Products liability law itself furnishes apt instances where corrective legislation is warranted. The United States Congress was faced with a major problem in its Swine Flu program some seven years ago, when the ill-conceived products liability decisions in Davis v. Wyeth Laboratories, Inc., 399 F. 2d 121 (9th Cir. 1968), and Reyes v. Wyeth Laboratories, Inc., 498 F. 2d 1264 (5th Cir. 1974), made it impossible for any private manufacturer to provide vaccine for a mass immunization program without explicit legislative protection against an excessive tort exposure. The root of the problem lay not with manufacturing defects, but with the judicial insistence that the original manufacturers provide "adequate" warnings to ultimate users. The decision in *Reyes* has been described as "irresponsible" by some of the most acute critics of proposed reform legislation. Twerski and Weinstein, A Critique of the Uniform Product Liability Law—A Rush To Judgment, 28 Drake L. Rev. 221 (1978-79). But there is no reason for legal uncertainty to prevent implementation of a public health program otherwise required. Only legislation can clarify the core issues. Congress passed such legislation in the Swine Flu Act, 42 U.S.C. § 247(b). Yet *Reyes* and *Davis* are not isolated decisions, but are based upon the same questionable assumptions that pervade so many modern products liability cases. The need for some corrective action is clear.

WHY FEDERAL LEGISLATION?

There is then a compelling case to consider legislation to improve various aspects of products liability law. The strength of that case has been recognized by the many state legislatures, who have passed their own programs of legislative reform. To justify federal legislation, it must be explained why these state efforts should not be regarded as sufficient. Here there are several pertinent observations.

Products liability law must be contrasted with other forms of tort liability, such as medical malpractice or municipal liability. In both those cases most of the suits involved plaintiffs and defendants drawn from the same jurisdiction. Thus for medical treatment, the sensible rule makes the place of the treatment uniquely determine the applicable law. And, almost by definition, the liability of a municipality for the condition of its property or the conduct of its officials will be bound to a single state, governable by local law. Products liability presents however a very different situation. Here the defendant will act in one jurisdiction; his product will often be used in a host of others. There is no doubt that any mass—produced products will be subject to the inconsistent liability regimes of 50 separate states; and as the systems of state law continue to diverge, the nagging issues of Conflicts of law will become all the more difficult to resolve. State legislation may improve the substance of products liability law within any given jurisdiction; but it will not eliminate the inconsistent treatment of like cases between jurisdictions, nor resolve the conflicts of law problems that emerge. All product liability insurance is written on a nationwide basis. Uniform national standards could ease the task of determining policy terms and setting policy premiums for the benefit of all concerned.

It might be thought that the end of uniformity could be achieved by a uniform state act. The Uniform Commercial Code (U.S.C.) is an illustration of one such act that has been successful. But it is not an apt precedent. The internal cohesion of the business community, and the long periods of Code preparation, made it possible to pass virtually identical versions of the U.S.C. in each state. And as a general truth state court decisions interpreting the Code have followed precedents drawn from other jurisdictions. With products liability the clashing claims of divergent interests preclude any uniform state law. Indeed the statutes enacted to date have differed as much with each other as they do with the common law. Efforts to introduce new legislation at 50 state houses will, in addition to the costs that the effort will entail, do little to enhance any legal uniformity. And without the possibility of an authorative federal interpretation of the statute, state court decisions could undo any uniformity that might be achieved—especially if given sections of state legislation struck down on state constitutional grounds that are, under the Supremacy Clause, unavailing as against federal statutes. The problem of products liability is now preceived by all to be a problem of national dimensions. Only the federal response will be at the same level as the problem itself.

In assessing the need for uniform legislation, it should be clear that the divisions that have emerged in the current state laws are deep and important. Some of these, such as the use of the outside statute of limitations, are created by state legislation. But many important differences stem from judicial decisions as well. California has in Barker v. Lull, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978), for example, adopted an expansive design defect standard of liability that was shortly thereafter rejected by the Oregon court in Wilson v. Piper Aircraft, 282, Or. 61, 577 P.2d 322 (1978). The rule of "market share" liability has been adopted in California, Sindell v. Abbott Laboratories, 28 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), but it has been rejected to date in New Jersey, Namm v. Namm, N.J. , A.2d , and in South Carolina, F. Supp. (19), while its status in Michigan is now before that state's Surpreme Court and the application of market share principles to other areas, e.g., asbestos, is wholly unsettled. In some states, a comparative negligence standard applies, while in others the only possible defense in a products liability case rests upon some limited version of the assumption of risk doctrine. In some jurisdictions evidence of subsequent improvements is admissible to impune the safety of a product previously made and marketed, while in other jurisdictions the evidence is excluded, or admitted only for limited purposes. In some states there are no outside statutes of limitations, and in the many states that have adopted them there is an enormous variation amongst states as to the types of defects, or cause of actions covered, not to mention the appropoiate periods of time.

It is possible to overstate the importance of uniformity; a statute which adopted all the worst features of current state law would be inferior to the preservation of the status quo ante. But an intelligent legislation that both improved the substantive law and reduced the differences between states would clearly be a desirable matter. One cannot therefore give a blanket endorsement to federal legislation without first seeing the bill that emerges. But it can be said with confidence that the entire matter is a fit one for legislation, legislation which if intelligently crafted, should be enacted at the federal level.

WHIRLPOOL CORP.,
Benton Harbor, Mich., April 8, 1982.

Hon. ROBERT W. KASTEN,
221 Russell Senate Office Building,
Washington, D.C.

DEAR SENATOR KASTEN: Whirlpool Corporation, a leading manufacturer and marketer of major home appliances, fully supports the concept of a uniform federal product liability law, and cetainly commend your efforts in this area. We submitted comments on the first staff workihg draft of your products liability bill, and we now wish to offer for the record a few of our thoughts on the second staff working draft, particularly with respect to two aspects of the bill.

First, we are concerned that Section 10 of the current draft omits a time limitation on liability with respect to products other than capital goods. We are particularly concerned over the omission of a time limitation on liabilities for major home appliances. While the initial draft contained a time limitation which we considered to be inordinately long (20 years), we feel that it is important that a time limitation for major home appliances be reinstated in the formal bill which you propose to introduce.

Commensurate with our earlier comments on the first draft of your bill, we believe the time limitation for major home appliances should be in the range of 10 to 12 years. Our reasoning was outlined in detail in our original comments on the first staff working draft. In brief, however, carefuly designed and well constructed major home appliances will likely function efficiently and safely over their normal lives. Yet, they may fail in an unsafe manner with prolonged use beyond their normal useful lives, particularly when they are not properly maintained. We believe the same reasoning applies to many other types of products, such as automobiles. Thus, a time limitation on liability somewhat paralleling normal useful life is needed to protect manufacturers of major home appliances, as well as many other manufacturers, from product liability claims and litigation against which they cannot reasonably protect themselves.

Our other major concern is the continued existence of a provision for punitive damages, as set forth in Section 11 of the current working draft. As we have stated before, we feel that punitive damages were originally justified on the basis of compensating an injured party for actual damages that were not compensable under early civil law. This reasoning is no longer valid, since actual damages can now be completely recovered through civil actions, and punitive damages, where granted, generally provide unreasonable awards in excess of the actual damages suffered.

Moreover, punitive damages become burdensome for both businesses and the general public. Businesses must either bear the significant premiums which insurance carriers feel compelled to charge for the unkown exposure or, sometimes, bear directly assessed punitive damages which they have self-insured either by preference or by necessity (as punitive damages cannot be insured in some jurisdictions). The additional charges often are factored into the sales prices of the products involved, and accordingly, are borne by the consumer.

Also, as you are likely aware, punitive damages sometimes bankrupt businesses which are self-insured. Small and medium size businesses are especially vulnerable to this danger, and their failures naturally lead to additional unemployment and further economic instability for the general public.

While we hope you will consider the above comments before finalizing your bill, let me assure you, again, that we endorse your overall efforts toward a uniform product liability law. Please feel free to call Mike Thompson (616/926-3024) or Jake Paschall (616/926-3491), who have worked with me in this area.

Sincerely,

STEPHEN E. UPTON.

AMERICAN BAR ASSOCIATION,
Chicago, Ill., April 27, 1982.

GEORGE W. KEELEY, Esq.,
Chicago, Ill.

DEAR MR. KEELEY: Thank you for your letter of April 14 concerning the Association's position on product liability legislation.

In reference to your concern about secretive deliberations and decisions, the Association makes extensive efforts to ensure that the membership learns about actions taken by the House of Delegates. A report of these actions is sent to Section and Committee chairpersons, as well as Presidents and Executive Directors of state and local bar associations. In addition, we expect that State Delegates will inform state and local bars of the significant events at Annual and Midyear Meetings. In addition, some activities at the meetings are covered by the press and the ABA Journal. The March, 1981 issue of the Journal had a section devoted to the 1981 Midyear Meeting, although the product liability resolution was not discussed. Broader publicity simply is not feasible. With a membership of over 290,000, the cost of informing all members directly of the actions by the House of Delegates would be prohibitive. In general we believe that most members are informed of matters of particular interest to them through the Committees, Sections and state and local bars.

As for your interest in having the Association reconsider this policy, some groups are already working to change policy. The Section of Public Contract Law has informed me that they are preparing a proposal for the Annual Meeting in August, and I believe that the Section of Corporation, Banking and Business Law is also interested in reconsidering this policy. I suggest that you write the Chairmen of these Sections if you are interested in their activities.

Sincerely,

DAVID R. BRINK.

AMERICAN APPAREL MANUFACTURERS ASSOCIATIONS,
Arlington, Va., June 30, 1982.

Hon. ROBERT W. KASTEN, Jr.,
Chairman, Consumer Subcommittee, Senate Committee on Commerce, Science, and Transportation, Russell Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: This letter is with respect to S. 2631, the Product Liability Act which you introduced on June 16, 1982. We would appreciate it being included in the record of hearings on this subject.

The American Apparel Manufacturers Association (AAMA) is the central trade association of the U.S. apparel industry, representing about two-thirds of the domestic capacity for apparel production. Our membership embraces companies in every line of apparel manufacturing.

Because our members enjoy a national market for their product, we believe that a preemptive federal product liability law is necessary to correct the widely varying state and case law on the subject. At our last Annual Meeting on May 12, 1982, our Board of Directors went on record in support of appropriate model product liability legislation.

Specifically, we support legislation which provides:

(a) Uniform and predictable standards by which manufacturers can determine their liability;

(b) a reasonable limitation on the time during which manufacturers may be held liable for injuries resulting from the use of their product;

(c) apportionment of responsibility among those found at fault, including the claimant; and

(d) protection of manufacturers from liability where they comply with relevant government safety standards and specifications.

S. 2631 addresses the first three but not the last, which we believe is a serious omission. In fact, AAMA's endorsement of model product liability legislation is predicated on it providing that a manufacturer's compliance with federal safety standards governing the manufacture of the product constitute a defense to product liability suits.

Textile and apparel products, in large part, are currently subject to standards promulgated under the Federal Flammable Fabrics Act.

Therefore, we strongly urge that S. 2631 be amended to include language providing that products, which, at the time of their manufacture, meet a federal safety standard, not be considered unsafe and that to prevail in an action on such a product, a claimant must show by clear and convincing evidence that the standard was not met at the time of manufacture.

Sincerely,

ELLIS E. MEREDITH, *President.*

NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION,
Washington, D.C., July 16, 1982.

Senator ROBERT W. KASTEN, Jr.,
Chairman of the Consumer Subcommittee,
Russell Senate Office Building, Washington, D.C.

DEAR SENATOR: NEMA would like to take this opportunity to supplement the hearing record on the "Product Liability Act" (S. 2631).

We were generally pleased with the quality of the testimony. However, it was distressing to hear the plaintiff's bar and consumer advocates continue to oppose the bill. The plaintiffs' attorneys appear to be arguing to perpetuate their right to make new law in each lawsuit. And the consumers appear not to understand the economic problem that arises from product liability litigation, the ultimate impact of which falls on the consumers themselves. We hope that these interests will come to understand that the effect of your bill is to balance all of the interests affected while preserving the fault system. Reviewing judicial actions and their effect on the rights of citizens is a typical and appropriate responsibility of legislatures.

NEMA's major concerns in any product liability legislation are: the proper application of a negligence standard to design and warning decisions; adoption of a system of comparative responsibility; elimination of evidence of subsequent change to the product; and finding a proper balance between the workers compensation system and a product liability law.

We are happy that the bill addresses these questions and offer our views to assist the Committee in preparing the bill for markup and passage.

POST MANUFACTURE DUTY TO WARN

One of the most puzzling areas of the bill is the duty to warn, § 6. Section 6(b) imposes the duty on a manufacturer based on his actual or imputed knowledge of danger, the effectiveness of the warning and the behavior of a "reasonable prudent manufacturer" and "reasonably prudent user".

The electrical industry has a long history of concern over the safe use of electrical energy. Through the years, many documents have been produced to educate persons who come into contact with electrical products. Voluntary standards, sometimes adopted as American National Standards, are available on many aspects of machine design and performance. Other standards govern use and application of products. Still other standards address maintenance of electrical equipment and proper conduct when working on energized equipment.

Thus, NEMA urges that the law be made clear that the "reasonably prudent manufacturer['s] " decision not be judged solely on the basis of the existence *vel non* of a warning label or instructions. We understand that manufacturers would be able to rely on the totality of information available to the user and on the state of knowledge of that user. It is important that this understanding be clearly stated. Either report language or an amendment like the following might achieve this goal:

§ 6(d)(2)(B) dangers that the manufacturer reasonably believed would be the subject of adequate warnings or instructions to the product user from another source.

After the product has been manufactured, § 6(c) imposes a duty to warn on manufacturers based on their knowledge and on the conduct of a "reasonably prudent manufacturer." This duty raises two questions. First, the section is not appropriate to the case of electrical products, especially in view of the duty to warn in §6(b) that includes the duty to warn for what the manufacturer "should have known." Electrical technology is mature: Field experience with past products enables manufacturers to analyze what is likely to happen to products introduced now. The extra burden imposed by § 6(c) would not provide meaningful results. Second, if § 6(c) is needed and should be applicable to the electrical industry, then it is important to narrow its focus to dangers learned after the product is in the field and not to include factors that "should have [been] known" and analyzed under § 6(b) at the time of manufacture. A manufacturer who perceives a legitimate need to issue instructions or a warning would not in doing so face the burden of defending in court his decision at the time of design and manufacture. Such a burden would not increase certainty and reasonable management decisions, a stated objective of the act. Section 6(c) needs to make clear that it is only concerned with information learned after manufacture from the manufacturer's reported field experience. The appropriate test is what a reasonably prudent manufacturer would have done subsequent to manufacture. It is important that this test not permit the evaluation before manufacture to be reconsidered in the courtroom as a postmanufacturing question.

It also seems inconsistent that § 6(c) does not include the ideas in § 6(b)(3) and (4) that are logically a part of the § 6(c) analysis.

EVIDENCE OF SUBSEQUENT CHANGE SHOULD BE PROHIBITED, § 14(b) SHOULD BE DELETED

NEMA has always supported the concept of excluding evidence of subsequent change to products. Section 14(b) attempts to create an exception to this rule that would permit introduction in design cases for the limited purpose of impeaching expert testimony on the feasibility of alternative designs. This exception could create a curious Catch-22 for a defendant manufacturer. If he admits the feasibility of an alternative design, he has made an admission against interest. If he denies feasibility of alternative, then the evidence will be admitted to impeach the expert. In either event, the evidence would be admitted. Such a choice would be unfair to any party.

NEMA SUPPORTS THE TREATMENT OF WORKERS COMPENSATION IN S. 2631

S. 2631 contains a reasonable compromise on a very difficult problem. The bill strikes a balance between a no-fault system (workers compensation) and the fault system in product liability law.

THE DEFENSE OF COMPLIANCE WITH A GOVERNMENT CONTRACT SPECIFICATION SHOULD BE RETURNED TO S. 2631

During the preparation of S. 2631, one provision would have made compliance with a government contract specification by a supplier a defense. NEMA is persuaded that such a provision is a necessary part of a federal product liability bill. The government is a large buyer of products. Because government uses often vary from commercial practices, the government often imposes decisions about matters of design on the supplier. Since in such cases the government has made the decision on design, the government ought to be held responsible for the decision. If language from the Staff Working Draft does not appear suitable, we recommend that the Committee review H.R. 1504 and the amendments to the bill proposed by the National Association of Manufacturers.

CONCLUSION

NEMA through working on S. 2631 is seeking a better way to understand what society wants in the design and sale of manufactured products. Reasonable decisions can be better made during the design and development phase of a product's life than in a later case-by-case review in the courts. This change is not only good for the companies that make products, but also for the nation because it reduces costs, including transaction costs, and assures that a variety of useful and effective products will be available.

Sincerely,

DANIEL K. SHAPP,
Vice President, Public Affairs.

Walter C. Taylor, Jr., Assistant Secretary and Assistant General Counsel, Eli Lilly and Co.

Eli Lilly and Company commends Senator Kasten for his efforts to enact a Federal product liability tort law. Current uncertainty and instability in product liability tort law is a serious problem affecting interstate commerce and the economy. A uniform law with fair and balanced provisions will benefit manufacturers and product sellers, who currently have no guidelines on how to avoid or predict liability with respect to products which are sold in an interstate market and who, as a result of some aberrant rules in a few states, are hesitant to make or develop improved or new products. Unformity in the law will provide a basis for rational insurance ratemaking in the product liability area and for reduced litigation and other transaction costs. Finally, consumers will realize the benefits of reduced transaction costs, reduced insurance rates, and the introduction of product improvements in the marketplace. S. 2631 is a significant step toward achieving uniformity.

Eli Lilly appreciates this opportunity to comment on several provisions in S. 2631 which it supports or believes should be strengthened. In addition, the issue of compliance with government standards, which Eli Lilly believes should be addressed, is discussed below.

CAUSATION/IDENTIFICATION OF THE RESPONSIBLE MANUFACTURER

A basic tenet of product liability tort law is that the claimant must show, as an essential element of his case, that the defendant manufacturer was the manufacturer of the product which caused the injury. *E.g., Gray* v. *United States,* 445 F. Supp. 337, 338 (S.D. Tex. 1978); *Ryan* v. *Eli Lilly & Company,* 514 F. Supp. 1004, 1008 (D.S.C. 1981). As Dean Prosser stated:

> [Plaintiff] still has the burden of establishing that the particular defendant has sold a product which he should not have sold, and that it has caused his injury.[1]

The rationale for this causation/identification element of the claimant's case is sound. The party responsible for the harm should be the one to pay for that harm. Innocent manufacturers should not bear the costs of and cannot insure against harms caused by others. By ensuring that the responsible party is the one which will assume liability, S. 2631 would encourage manufacturers to use care in the manufacture and design of and warnings relating to their products in order to avoid liability for unreasonably unsafe products.

S. 2631 recognizes the traditional rule in section 4(a)(2). An exception to that element of the claimant's case is, however, provided in section 4(c). This exception is apparently the result of a few novel theories of liability, which depart from the traditional rule. Eli Lilly believes the departures are inequitable and a source of unpredictability and instability in product liability law, which may make insurance underwriting for particular insureds an impossible task. Such novel theories of law with such consequences should not, in the view of Eli Lilly, be included in S. 2631, the goals of which are fairness, predictability and stability.

For example, in *Sindell* v. *Abbott Laboratories,* 26 Cal. 3d 588, 607 P.2d 924, *cert. denied,* 449 U.S. 912 (1980), the court adopted a "market share" liability concept. There, the plaintiff claimed she could not establish which one of eleven drug manufacturers produced the drug which allegedly led to her injuries. The court held that if the plaintiff could prove at trial that the defendants represented a "substantial share of the relevant product market," each manufacturer would be subject to liability for a portion of the claimant's damage equal to its portion of the product market, unless it could prove that it did not make the product which caused the injury.

A second novel theory is "enterprise liability." It holds each member of an entire industry responsible for the claimant's *entire* harm. *See Hall* v. *E. I. Du Pont de Nemours,* 345 F. Supp. 353 (E.D.N.Y. 1972). In *Hall,* the six defendant manufacturers comprised the entire product market. All were alleged to have failed to warn users of risks associated with the blasting caps they produced. Even the *Hall* court warned that the theory should not be applied when all defendants were not before the court. *Sindell* followed this advice in rejecting an "alternative liability" theory, but unfortunately ignored the advice in adopting the "market share" liability theory. One Federal District Court sought to hold defendants liable when all defendants were not before the court. *Hardy* v. *Johns-Manville Sales Corp.* 509 F. Supp. 1353 (E.D. Tex. 1981), rev'd on other grounds. No. 81-204 (5th Cir., July 26, 1982).

A third approach to circumventing the basic cause-in-fact proof requirement is to expand conspiracy or concert of action theories far beyond their traditional boundaries. Under these theories, which are rooted in the criminal law of conspiracy, a group of defendants may each be jointly and severally liable if they actively encouraged each other's *wrongful* acts and produced an indivisible injury. By way of contrast, in *Bichler* v. *Eli Lilly and Company,* (N.Y. App. May 11, 1982), the court permitted a jury to find that defendant had engaged in "conscious parallel activity" with a number of unidentified pharmaceutical manufacturers concerning the testing and marketing of DES. On this theory, the court imposed liability on a single defendant who had not been shown to have actively encouraged wrongful activity on the part of others. Further, there was a jury finding that the defendant had *not* made the drug in question.

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[1] Prosser, *The Fall of the Citadel (Strict Liability to the Consumer),* 50 Minn. L. Rev. 791, 840 (1966). *See also* Prosser, *Handbook on the Law of Torts* § 41 at 236 (1971).

These radical departures from traditional product liability law can lead to serious and undesirable consequences. For example, pre-marketing tests may be made unnecessarily more stringent, causing some beneficial products to be withheld from the market to the detriment of the public. Further, insurers, unable to predict an insured's risk exposure, may decide to withhold coverage altogether. Such consequences are exacerbated by the fact that the case law is unpredictable. For example, market share liability stands as the rule of only one state. The rule there has yet to be applied and, in its application, may prove unworkable and costly in both time and resources.

Eli Lilly maintains that S. 2631 should codify the traditional causation/identification requirement without exceptions as was proposed in Staff Draft No. 2 (March 1, 1982.)

OFFENSE AND DEFENSIVE COLLATERAL ESTOPPEL

Eli Lilly fully supports the bar to the use of offensive and defensive collateral estoppel. See sections 4(b) and 8(d). These theories, off-shoots of the collateral estoppel rule, are not appropriate in product liability cases. A growing number of courts, however, are permitting the use of the theories or are being asked to permit use of the theories.

S. 2631 recognizes that the theories are not appropriate in a products case and provides a clear rule of law prohibiting their use.

The traditional collateral estoppel rule has a sound rationale. It bars relitigation of an issue which was involved in prior case if four elements are met: (1) the issue raised in the prior case is identical to the issue in the present case; (2) the issue was actually litigated and decided in the prior case; (3) the resolution of the issue was necessary to the judgment in the prior case; and (4) the party to be barred from relitigating the issue was a party in the prior case.[2] The fourth element is the so-called "mutuality rule", requiring that the prior judgment bind both parties to the subsequent case in order for one party to invoke collateral estoppel and prevent relitigation of an issue.[3]

Offensive and defensive collateral estoppel do not require mutuality of parties. Under offensive collateral estoppel, a plaintiff is permitted to establish an issue in his case against the defendant on the basis of an issue decided in a prior case against the defendant even though the plaintiff invoking collateral estoppel was not a party to the prior action and, therefore, not bound by the prior judgment. Under defensive collateral estoppel, a defendant may establish an issue against the plaintiff even though he was not a party to the prior action.

The Supreme Court sanctioned the use of offensive collateral estoppel in a securities case.[4] That case announced that Federal courts had "broad discretion" to determine when the doctrine should apply in Federal Court cases. Some district courts have applied the doctrine in product liability suits,[5] while others have refused to do so in similar suits.[6] Thus, in Federal courts the rule regarding use of offensive collateral estoppel in product liability suits is not clear.

In state courts, there is a similar split in opinion and unpredictability. Some states adhere to the mutuality of parties requirement.[7] Other states do not.[8] Even where mutuality is not required, it is not clear whether the doctrine of offensive or defensive collateral estoppel would be applied in a product liability case, in which, as discussed below, the doctrine is unfair and inappropriate.

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[2] Wright, Miller & Cooper, 18 Fed. Prac. & Proc. § 4416 (1981). The doctrine promotes judicial economy by preventing needless litigation on an issue already fully litigated.

[3] *Id.* at § 4663.

[4] *Parklane Hosiery Co.* v. *Shore,* 439 U.S. 322 (1979).

[5] *Flatt* v. *Johns-Manville Sales Corp.,* 488 F. Suppl. 836 (E.D. Tex. 1980).

[6] *McCarty* v. *Johns-Manville Sales Corp.,* 502 F. Supp. 335 (S.D. Miss. 1980); *In re Asbestos & Asbestos Insulation Material Products Liability Litigation,* 431 F. Supp. 906, 910 (J.P.M.D.L. 1977).

[7] *E.g., Norfolk & Western Ry.* v. *Bailey Lumber Co.,* 221 Va. 638, 272 S.E. 2d 217 (1980); *Newport Division, Tenneco Chemical, Inc.* v. *Thompson,* 3309 So.2d 828 (Fla. App. 1976). *See also Spartacus Youth League* v. *Board of Trustees of Illinois Industrial University,* 502 F. Supp. 789 (N.D. Ill. 1980) (applying Illinois law). *See also, Goodson* v. *McDonough Power Equipment Inc.,* —— Ohio St. 2 ——, appeal pending Ohio Supreme Court (lower court applied collateral estoppel using a 1974 Florida decision and found the defendant liable).

[8] *E.g., Cutler* v. *Town of Durham,* 120 N.H. 110, 411 A.2d 1120 (1980); *Hicks* v. *De La Cruz,* 52 Ohio St. 2d 71 (1977).

Collateral estoppel is intended to encourage an end to litigation and to conserve judicial time and resources. However, it is not a mere housekeeping measure, rather it is a doctrine based on fairness and justice. The use of offensive and defensive collateral estoppel in product liability law is unfair, even if a uniform Federal law controlled all the issues in a product liability case. Like the traditional collateral estoppel rule, these theories should not be used "to dispose of cases merely for the sake of disposition to clear up dockets." [9]

The potential for unfairness can be illustrated with several examples. The prior verdict may have been erroneous, given the opportunity for court error, for example, on admissibility of evidence [10] or on instructions to the jury, and given that juries are composed of laymen who must evaluate and decide complex technical issues.[11]

The prior verdict may have been decided against the manufacturer based on jury sympathies for the prior plaintiff, on facts or emotional bases which are not present in the subsequent case. To apply collateral estoppel based on the prior sympathy verdict would "exalt technical nicety over substantial justice." [12] The erroneous or sympathetic verdict in a prior case may have been accepted by the manufacturer simply because the costs of an appeal were greater than the cost of the adverse judgment.[13] The prior adverse judgment may be the only adverse judgment on the issue; the manufacturer may have prevailed in every other case. It is unfair and unsound public policy to treat a single, unreliable, perhaps erroneous decision as a determinant for all future cases.[14]

Further, the decision of a jury in a product liability case, if given weight by the application of offensive or defensive collateral estoppel, would make a single decision, in effect, a national standard. For example, if in one case the jury finds that a product is unsafe for failure to provide a guard or a warning, then that decision would control a manufacturer's conduct because in all subsequent cases, the issue of safety would not be litigated. Apart from the fact that the prior decision may be wrong or prompted by jury sympathy, it is inappropriate to permit a single group of laymen to establish such a national standard, particularly since it must focus only on the single case before it. It is difficult enough to tolerate errors in isolation; they should never be permitted to condemn product lines.

Finally, it is doubtful whether in a product liability case there can be a true "identity of issues" which is a requirement of collateral estoppel. Each case involves a unique interplay of persons, products, and environment, and on each factor the circumstances may vary, for example, was the person sober, medicated, old, young; was the machine new, repaired, maintained; was it rainy, foggy, dusty, noisy. It is unfair to prevent consideration of such critical factors in a subsequent case.

In sum, the use of offensive and defensive collateral estoppel is inappropriate in product liability tort litigation and should be barred. Failure to bar the use of these theories will lead to increased transaction costs, because parties will brief and rebrief and arguments for and against use of offensive and defensive collateral estoppel in product liability suits. Neither side would know with certainty whether the doctrine would be applied in a given case. Parties would be forced to assume the worst and to litigate all cases as if the issues there would be determinative of issues in subsequent cases. The time and resources spent on each issue in even the smallest case would be neither cost-effective nor justifiable.

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[9] *Parklane, supra* n. 4, 439 U.S. at 328. *See also Katz* v. *Eli Lilly,* 84 F.R.D. 378, 382 (E.D.N.Y. 1979); *Blonder-Tongue Lab., Inc.* v. *University of Illinois Foundation,* 402 U.S. 313, 334 (1971).

[10] For example, one judge may exclude evidence while, in the subsequent case, the same evidence would be admissible if the manufacturer was permitted to litigate the issue. Evidentiary rulings, thus, affect the outcome of a case.

[11] For example, Henderson, Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication, 73 Col. L. Rev. 1531, 1531–34 (1973) (questioning whether juries can competently decide such issues).

[12] *Katz, supra* n. 9, 84 F.R.D. at 382.

[13] *See Berner* v. *British Commonwealth Pacific Airlines, Ltd.,* 346 F.2d 532 (2d Cir. 1965), *cert. denied,* 382 U.S. 983 (1966). There, use of offensive collateral estoppel based on a prior unappealed adverse judgment for a relatively small amount, $35,000, was prevented in a subsequent suit for $7 million.

[14] Recognizing this as a factor, *see, Parklane, supra* n. 4, 439 U.S. at 330; Restatement (Second) of Judgments § 88(2), Comment (Tent. Draft No. 2, 1975). *See also, Young* v. *U.S.,* 518 F. Supp. 921 (S.D.N.Y. 1981); *Grill* v. *U.S.,* 516 F. Supp. 15 (E.D.N.Y. 1981) (refusing to apply collateral estoppel in a product liability case based on the decision against the government in one prior case); *Tretter* v. *Johns-Manville Corp.,* 88 F.R.D. 329 (E.D. Mo. 1980).

S. 2631 appropriately resolves the current atmosphere of uncertainty and, in doing so, fairly promotes uniformity, stability, and predictability in the law and reduces transaction costs and resources.

SUBSEQUENT REMEDIAL MEASURES

Eli Lilly fully supports section 14 of S. 2631 which excludes evidence of remedial measures taken after an event which, if taken before, may have made the event less likely to occur. This exclusionary rule is reflected in Federal Rules of Evidence 407 and is the rule in the overwhelming majority of states. A few cases, however, have rejected the rule in product liability actions.[15] This rejection has serious public policy implications and should not be tolerated.

There are three reasons for the rule excluding evidence of subsequent repairs. First, the evidence is irrelevant in design and warning cases,[16] because post-manufacture improvements in safety do not prove that a product seller was at fault at the time the product was manufactured.[17] A jury could misuse evidence of a post-manufacture change to infer an admission of fault or liability. Second, the public policy of encouraging repairs and improving products would be discouraged if such evidence were admitted. If product modifications could be used to imply fault, manufacturers may be deterred from exploring ways and means to make products safer.[18] Third, admitting such evidence unfairly punishes those who take responsible steps to improve product safety.

These reasons for the exclusionary rule are sound and are recognized by S. 2631.

STATUTE OF REPOSE

Eli Lilly believes that both the statutes of repose offered as alternatives in S. 2631 fail to achieve a fair result. In this regard, Eli Lilly notes that the statute of limitations in the act is the broad discovery rule, giving the claimant 2 years from the date of discovering the harm in which to bring the action. This discovery rule is more favorable to the claimant than the law in many states. Accompanying this rule should be a repose provision limiting the time a manufacturer is responsible for product-related claims.

Alternative A in section 12 of S. 2631 specifies a 25-year statute of repose solely for capital goods. Eli Lilly believes that the conclusive period of repose should apply to other products as well. There is no public policy reason for requiring drug manufacturers, for example, to remain forevery ready to defend and pay for product liability claims, while limiting the liability of capital goods manufacturers.

First, it is simply unfair to make the distinction. Second, if a manufacturer's liability continues forever, its insurance must reflect that unlimited risk. Premiums must be set accordingly, and incurred but not reported loss reserves must be inflated to cover the chance that a claim relating to an old product may arise. In practice, the insurance industry is forced into a "worst case" analysis even though the possibility of a claim may, as a practical matter, be remote.

Third, and perhaps most significant, a manufacturer faced with a claim that is 30, 40, or 100 years old, is unfairly prejudiced at trial. Evidence may be lost or unavailable. Key defense witnesses may be decreased or lost. Further, the jury has before it a claimant, and it has some 30, 40, or 100 years of modern knowledge which did not exist when the product was made. It is virtually impossible to insulate the jury from that modern knowledge and to focus their attention on knowledge as it was when the product was made. Thus, a manufacturer is prejudiced by hindsight—a jury will judge actions taken 40 years ago against knowledge as it exists today.

A reasonably long period of repose for all manufacturers will avoid these problems of proof and prejudice and will avoid unreasonable surges in insurance. Given the liberal "discovery rule" in S. 2631, which governs when a claim arises, a statute of repose is only fair. There must be some period of time after which claims can no longer be brought and after which a manufacturer and its insurer know they are not responsible.

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[15] *E.g., Farner* v. *Paccar,* 562 F. 2d 518 (8th Cir. 1977); *Robbins* v. *Farmer's Union Grain Terminal,* 522 F. 2d 788 (8th Cir. 1977); *Ault* v. *Int'l Harvester Co.,* 13 Cal. 3d 113, 177 Cal. Rptr. 812, 528 F. 2d 1148 (1974); *Caprara* v. *Chrysler Corp.,* 52 N.Y. 2d 114 (App. Div. 1981).

[16] In a case based on a construction defect or breach of express warranty, there is no need to use evidence of subsequent remedial measures to prove liability because strict liability applies.

[17] 2 J. Wigmore, Evidence § 283 (Chadburn Rev. 1979) at 174–75. *See* Hoffman and Hoffman, Post-Accident Revisions to Standards—A Syllogistic Trap? (1981) (listing 25 reasons for making changes in safety standards which are unrelated to fault).

[18] *See* C. McCormick, Evidence § 275 (2d ed. 1972) at 666; 2 J. Wigmore, *supra* n. 17, § 283 at 175.

Eli Lilly appreciates the fact that alternative B in S. 2631 applies to all products. This proposed repose period is, however, only a presumption. Such a presumption fails to resolve the concerns of manufacturers, because it leaves them with potentially open-ended liability which cannot be predicted or insured against with any degree of certainty.

S. 2631 should include a conclusive statute of repose for all manufacturers and all products. Eli Lilly supports a 10-year repose period, except for harms caused by the cumulative effect of prolonged exposure to a product and by latent harms, for which Eli Lilly supports a 20-year period of repose. Eli Lilly agrees that there should be no repose period for harms caused by intentional misrepresentation or fraudulently concealed facts.

UNAVOIDABLY DANGEROUS ASPECTS OF A PRODUCT

Eli Lilly supports the definition of an unavoidably dangerous aspect of a product and the statement that such aspects do not render a product unreasonably dangerous in design. *See* section 5(c). Existing law also recognizes that a product is unavoidably dangerous if, at the same time it was made, the danger could not have been eliminated without impairing (1) the effectiveness of the product's function or (2) the desirability of the product to the user.

The Restatement (Second) or Torts recognizes that a manufacturer is not responsible where it makes a "useful and desirable product, attended with known but apparently reasonable risk." § 402A, comment k.

The Restatement also recognizes that a product is unavoidably dangerous if the associated risks cannot be eliminated without impairing the desirability of the product to the user. § 402A, coment i. Consumers often desire products which, by their very nature, are not entirely safe. Butter, whiskey, and tobacco all carry with them potential risks.

Those risks are normal characteristics of the product which cannot be eliminated without impairing the desirability of the product to the consumer.

Eli Lilly believes that such unavoidable dangerous products should not expose a manufacturer to liability for a design defect, as is provided in section 5(c).

EMOTIONAL HARM

Eli Lilly supports the definition of harm in section 2(5) of S. 2631, particularly the provision which specifies recovery for "mental anguish or emotional harm of the claimant caused by the claimant's personal physical injury, illness or death."

This definition excludes claims based solely on emotional harm sustained by the claimant, by a bystander observing an event or by any other person. Eli Lilly believes the exclusion is justified. Claims for pure emotional harms are difficult to prove and even more difficult to defend. In fact, such claims may easily be fabricated. Potential claims for pure emotional harms, particularly from bystanders, relatives, or others who have some connection with the physical injured claimant, are impossible to predict and, therefore, impossible to insure.

Eli Lilly believes that the exclusion of such claims will eliminate unsound claims and, thereby, reduce costs currently associated with pursuing and defending those claims. It will not unfairly preclude recovery to any class of legitimately injured claimants.

COMPLIANCE WITH GOVERNMENT STANDARDS

Eli Lilly is concerned about what it perceives to be a very serious omission in S. 2631—the evidentiary effect of compliance and non-compliance with Federal standards and approvals which relate to product design and warnings. Failure to address this leaves open a major issue in product liability tort law, as well as one that the Congress of the United States is particularly equipped to address. Staff Draft No. 2 recognized this and addressed Federal standards only.

Federal standards stem from agencies which are directly responsible to Congress. The agencies and the efficacy of their standards are subject to congressional review. This and the fact that the purpose of S. 2631 is to provide uniformity and certainty lead Eli Lilly to believe that a Government standards provision should be included in the bill. Discussed below are (1) two provisions which Eli Lilly supports, (2) the rationale for the provisions, and (3) case law which is in accord with the provisions.

EVIDENTIARY PRESUMPTIONS FOR COMPLIANCE WITH FEDERAL STANDARDS AND APPROVALS

When an aspect of a product at the time it was made *complies* with applicable Federal standards or approvals relating to design or warnings, that aspect should be *presumed safe,* unless the claimant proves by clear and convincing evidence that the design or warning was unreasonably unsafe. Conversely, where an aspect of the product does *not comply* with Federal design or warning standards or approvals, it should be *presumed unsafe,* unless the manufacturer proves by clear and convincing evidence that failure to comply was a reasonably prudent course of conduct.

RATIONALE FOR THE EVIDENTIARY PRESUMPTIONS

The presumption for compliance with Federal standard assumes, in the absence of clear proof to the contrary, that a manufacturer has acted reasonably in designing or warning about a product. Thus, it assumes that a claimant cannot establish the element of a design or warning defect case, which requires proof that the manufacturer acted unreasonably.

This assumption is logical. Federal standards are developed by agencies whose mandate is to ensure the manufacture and sale of safe products and whose determination of the need for a particular standard involves balancing the same factors considered by a jury in a design or warning case. The agency determination should not be lightly second-guessed or overruled by a trier of fact in a products case. This may be demonstrated with reference to the Food and Drug Administration's (FDA) approval of a new drug. Such approval is determination that, given available evidence, the new drug is safe and effective for its intended uses as recommended on its label.

Available evidence, however, may not guarantee safety. Thus, FDA approval is not an indication that the drug is absolutely free from adverse effects nor does it guarantee that, under evidence which may come to light in the future, the drug will continue to be considered safe. Rather, the approval is a determination that, based on all available data, the benefits of the drug outweigh the risks.

The jury in a design or warning defect case balances similar factors in determing if the product seller is liable. For example, it considers the likelihood and seriousness of harm to the user and the adverse effects on the user and on the effectiveness of the product if a different design were used. Just as the FDA in approving a drug does not require data which *guarantees* safety and effectiveness, the jury in a design defect case does not require use of an *absolutely* safe design. Rather, both look to the *reasonableness* of marketing the product given the knowledge at the time the product was made. The jury determines whether, given knowledge at the time the product was made, the product seller acted reasonably in putting the product into commerce. The FDA determines whether approval of the new drug is reasonable given the available evidence on its safety and effectiveness.

Approval of the new drug is a finding by the FDA that the drug is reasonably safe for marketing. Manufacturers who comply with the approval limitations as to labeling and formulations should be presumed to have acted reasonably in marketing the drug and, therefore, not subject to liability for design or warning defects.

To find otherwise, the jury in a design or warning defect case must disagree with the FDA on what is reasonable. It must look at the same data considered by the FDA—data at the time of manufacture—and find, contrary to the FDA, that the product seller acted unreasonably in marketing the product. If the jury finds liability, it is substituting its judgment for that of the FDA and is saying, in effect, that the FDA should not have approved the new drug or that approval should have been withdrawn.

Such a result is patently unfair. What more would a reasonably prudent seller do than obtain the FDA's approval that the drug is safe and effective.[19] Further, such a result is contrary to the general intent of the Federal Food, Drug, and Cosmetic Act, which leaves the determination to the FDA,[20] and contrary to the principle that courts should defer to the expertise of the FDA, which is responsible for executing the act and setting its machinery in motion.[21]

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[19] Section 288C Restatement (Second) of Torts states: Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence *where a reasonable man would take additional precautions*. (Emphasis added). Comment (a) explains that, because most standards are minimum standards, courts may find that a reasonable man would have done more. FDA approval is not a minimum standard and, therefore, a reasonable man would not take additional precautions.

[20] *For example, United States* v. *1,048,000 Capsules, More or Less, "Afrodes"*, 494, F. 2d 1158 (5th Cir. 1974) ("the ultimate determination of the safety of a drug is not a matter given to the courts, but one to be determined by the Food and Drug Administration").

While this discussion has focused on FDA approvals, the rationale applies to other agency standards and approvals. Eli Lilly believes strongly that compliance and non-compliance with an agency mandate should give rise to presumptions of reasonable or unreasonable conduct.

CASE LAW ON EVIDENTIARY PRESUMPTIONS FOR COMPLIANCE WITH FEDERAL STANDARDS AND APPROVALS

Under the Restatement (Second) or Torts, compliance and noncompliance with legislative enactments and administrative regulations has an effect similar to that proposed under the evidentiary presumptions in Staff Draft No. 2— compliance is an absolute defense unless a reasonable person would have taken additional precautions. Restatement § 288C. Additional precautions are only required in special and very unusual situations. For example, where a driver clearly knows or should know that driving at the legal speed limit is unreasonable given unusual road conditions, he has a duty to drive more slowly. The Restatement comments specifically that "where there are no such special circumstances" compliance with the standard may be sufficient as a matter of law.

Prosser agrees, stating: [Where the situation is] clearly identical with that contemplated by the statute . . . and no special circumstances are involved, it may be found, and can be ruled as a matter of law that the actor has done his full duty by complying with the statute.[22]

Courts generally follow the rule in the Restatement, although the language used in the decisions indicates some uncertainty and vagueness about the rule. For example, a court may state that compliance with legislative or regulatory standards is "only" evidence that the manufacturer acted reasonably. In applying the rule, however, it appears that *very strong* evidence is required to overcome the fact of compliance and to prove liability. Where the manufacturer complies with the standards but, nevertheless, is held responsible for product-related harms, the courts find clear and convincing evidence of special circumstances imposing on the manufacturer a duty to provide precautions in addition to the standards. Where there is no clear evidence of special circumstances, compliance with the standards is evidence that the manufacturer satisfied his duty of care.

A comparison of the holdings in *Griffin* v. *Planters Chemical Corporation*[23] and *Hunter* v. *E. I. DuPont de Nemours & Company*[24] is illustrative of the case law. In *Griffin*, the manufacturer of parathion dust used a warning label approved by the Department of Agriculture (USDA). Upon finding that the manufacturer knew or should have known the unusually toxic effects of the substance, the court held that the manufacturer had a duty to use a label or furnish a warning in addition to that required by the USDA. Thus, compliance was insufficient proof of reasonable conduct, because there was clear evidence that the manufacturer should have done more.

In *Hunter*, however, no such special circumstances existed. There, the manufactuer of a weed-killer spray had registered the product and provided the label and warnings approved by the USDA. There was no evidence that the manufacturer knew or should have known such warnings were inadequate. As a result, the manufacturer's compliance with the regulations was sufficient evidence of due care, and it was not responsible for the claimant's injury. Thus, compliance raised a presumption of reasonable conduct which was not overcome by evidence that it should have done more.

Other cases, like *Griffin*, impose on the manufacturer a duty to do something more than meet relevant standards only where there are special circumstances. For example, in *Howard* v. *McCrory Corporation*,[25] and in *Raymond* v. *Riegel Textile Corporation*,[26] the courts found that, although the manufacturers had complied with Federal flammability standards and warnings, the plaintiff had produced evidence that the products' ignition *rate and burning* behavior under normal handling conditions rendered them unreasonable unsafe. Given this evidence that the standards were either out-of-date or not designed to address the situations in which the claimants were harmed, the manufacturers were liable.

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[21] *For example, Trans Alaska Pipeline Rate Case*, 436 U.S. 631, 648 n. 26 (1978), *quoting Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 315 (1933); *E. I. DuPoint de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54–55 (1977), *quoting Red Lion Broadcasing Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

[22] W. Prosser, *The Law of Torts* § 36 at 203–04 (4th ed. 1971).

[23] 302 F. Supp. 937 (D.S.C. 1969).

[24] 170 F. Supp. 352 (W. D. Mo. 1958).

[25] 601 F.2d 133 (4th Cir. 1979).

[26] 484 F.2d 1025 (1st Cir. 1973).

In *Whitley* v. *Cubberly,*[27] summary judgment for the defendent drug manufacturer was reversed, because evidence of special circumstances should go to the jury for a determination of whether the manufacturer had a higher duty of care than that imposed by Federal drug regulations. Specifically, the court said:

> [That] Parke-Davis may have fully complied with all applicable Federal laws in its marketing and labeling of Chloromycetin would not in itself free it of liability for harm caused by use of the drug it it were shown that such use and resulting harm was caused by the Company's negligent acts in overpromoting the drug, the dangerous propensities of which it was aware or in the exercise of due care should have been aware.[28]

In contrast, are cases similar to *Hunter* in which the claimant has no evidence of special circumstances which would raise the manufacturer's duty of care. Therefore, compliance with standards is evidence that the manufacturer is not responsible for the claimant's harm. For example, in *Quinn* v. *Southwest Wood Products, Inc.,*[29] a verdict for the claimant injured by a wooden ladder was reversed, because there was "overwhelming," "undisputed," and "undenied" evidence that the ladder design met or exceeded all relevant government design requirements. On that evidence, the court held that no reasonable person could have found that the ladder was defectively designed.

Similarly, the elevator manufacturer in *Westinghouse Electric Corporation* v. *Nutt,*[30] met its duty of care by conforming to relevant standards and was not liable, because the claimant failed to offer "contrary evidence that the product, as designed, created an unreasonable danger." [31] In *McDaniel* v. *McNeil Laboratories, Inc.,*[32] compliance with FDA drug approval standards satisfied the manufacturer's duty of care in the absence of evidence that the FDA approval "was based upon inaccurate, incomplete, misleading, or fraudulent information".[33] In the absence of fraud or other misleading activity on its part, the manufacturer's compliance with FDA approval standards was an absolute defense to liability.

The court in *Jones* v. *Hittle Service, Inc.*[34] stated the rule which is proposed by the Staff Draft:

> Compliance is evidence of due care and that the conforming product is not defective, and may be conclusive in the absence of a showing of special circumstances. Certainly, a manufacturer should be able to rely on such standards in the absence of actual or constructive notice that they are inadequate.[35]

The practical effect of the case law and commentary supports the presumptions which Eli Lilly believes should be included in S. 2631. In the absence of clear proof that the manufacturer knew or should have known that additional safeguards were necessary, compliance with relevant Federal design or warning standards is evidence that the manufacturer acted reasonably in the circumstances and, therefore, is not responsible for the claimant's harm. Such a clarification of existing law will reduce litigation costs and help eliminate any uncertainty about the relevancy of Federal standards in product liability cases.

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[27] 210 S.E.2d 289 (N.C. App. 1974).

[28] *Id.* at 292.

[29] 597 F.2d 1018 (5th Cir. 1979).

[30] 407 A. 2d 606 (D.C. App. 1979).

[31] *Id.* at 610.

[32] 241 N.W. 2d 822 (Neb. 1976).

[33] *Id.* at 828.

[34] 549 P. 2d 1383 (Kan. 1976).

[35] *Id.* at 1390.

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